Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–19 OF 2007(W), 02–20 OF 2007(W) AND 02–21 OF 2007(W)
NIK HASHIM, ABDUL AZIZ MOHAMAD AND AZMEL FCJJ
27 DECEMBER 2007

Civil Procedure — Injunction — Erinford injunction — Jurisdiction, want of — Whether an Erinford injunction could nevertheless be granted — Whether Federal Court had exclusive jurisdiction to grant an Erinford type of injunction pending the hearing and disposal of an application for leave to appeal to Federal Court

Civil Procedure — Injunction — Interim injunction — Matters within the jurisdiction of the Syariah Courts and s 54(b) of the Specific Relief Act 1950 — Whether a court could make a final determination on issues of law as opposed to a consideration of only the existence of a serious issue of law to be determined — Whether High Court empowered to grant interlocutory relief aimed at preserving status quo in the course of disposing a petition under s 51 of the Law Reform (Marriage and Divorce) Act 1976

Civil Procedure — Jurisdiction — Divorce proceedings — Husband filed application in the Syariah High Court for dissolution of the marriage and custody of the eldest son — Whether an abuse of process for converted spouse to file custody proceedings in Syariah Courts in respect of children of the Law Reform Marriage

Family Law — Children — Minor's religion — Constitutional right to decide religion of minor — Whether such right conferred on both father and mother of infant — Federal Constitution art 12(4)

Islamic Law — Jurisdiction — Matrimonial matters — Husband and wife non-Muslim at date of marriage — Husband converted himself and eldest son — Whether the High Court or the Syariah Court had exclusive jurisdiction to grant decrees of divorce — Whether Civil High Court had jurisdiction to hear and determine wife's divorce petition — Whether s 46(2)(b)(i) of the Administration of Islamic Law (Federal Territories) Act 1993 intended only to address marriages solemnized under the relevant State Islamic legislation

Islamic Law — Jurisdiction — Syariah Court — Hindu husband converted himself and eldest son — Husband filed application in the Syariah High Court

for dissolution of the marriage and custody of eldest son — Whether an abuse of process for converted spouse to file custody proceedings in Syariah Courts in respect of children of the Law Reform Marriage

The parties were married on 26 July 2001, the marriage being solemnized and registered under the Law Reform (Marriage and Divorce) Act 1976 (Act 164) ('the 1976 Act'). Being Hindu, they went through a Hindu wedding ceremony on 9 March 2002. There were two children of the marriage, both boys: Dharvin Joshua aged four and Sharvin aged two. On 18 May 2006, the Pertubuhan Kebajikan Islam Malaysia ('PERKIM') certified that on that day the husband and Dharvin had embraced Islam at the PERKIM headquarters. The certificate of conversion (which s 112 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 (No 1 of 2003) required to be issued to every registered convert) stated 18 June 2006 as the date of conversion. The husband filed an application in the Syariah High Court on 23 May 2006 pursuant to s 46(2) of the Islamic Family Law (Federal Territories) Act 1984 ('the 1984 Act') for the dissolution of the marriage and custody of the elder son. An interim custody order in respect of the converted son was issued to the husband by the Syariah High Court. On 4 August 2006, the wife filed a petition for the dissolution of the marriage pursuant to s 51 of the Law Reform Act coupled with an application for custody and ancillary reliefs in the High Court. The wife did not object to the husband's conversion to Islam. Meanwhile, the wife applied for and obtained an ex parte injunction against the husband. The husband then filed an application to set aside the said injunction. Pursuant to an inter partes hearing, the High Court dismissed the wife's application and allowed the husband's application and set aside the said injunction. However, the High Court granted an interim Erinford injunction pending an appeal to the Court of Appeal. On 13 March 2007 the Court of Appeal by a majority upheld the High Court decision to dismiss the application by the wife for an injunction but allowed the husband's appeal against the grant of the Erinford injunction by the High Court. There were now two appeals by the wife against the decisions of the court of appeal. On 30 March 2007 on a motion by the wife, the same panel of the Court of Appeal by a majority allowed an Erinford injunction pending her application for leave to appeal to the Federal Court against the decision of the Court of Appeal. The husband appealed against that decision.

Held, dismissing the wife's inter partes injunction, allowing wife's appeal in allowing the Erinford injunction by the High Court and dismissing the

husband's appeal granting of the Erinford injunction pending appeal to the Federal Court:

(1) (per **Nik Hashim FCJ**, **Azmel FCJ** concurring) The proviso to s 51(1) of the 1976 Act clearly reflected the imperative requirement which must be complied with before a petition for divorce could be made. By its terms, the proviso imposed a caveat on the wife not to file the petition for divorce until a lapse of three months from the date of the husband's conversion to Islam. It was the duty of the court to give effect to the words used by the legislature. Thus unless the proviso was complied with, the High Court would not have the jurisdiction to entertain the wife's petition (see para 11).

(2) (per **Nik Hashim FCJ**, **Azmel FCJ** concurring) In the court's view, the wife was entitled to proceed with the rest of the application but it would be most appropriate if she filed her petition for divorce afresh under s 51 coupled with an application for ancillary reliefs as the court would grant the reliefs under s 51(2) upon dissolution of the marriage (see para 13).

(3) (per **Nik Hashim FCJ**, **Azmel FCJ** concurring) Assuming that the wife's petition was properly before the court, then the court's view was that the High Court would have the jurisdiction to hear and determine the petition for divorce and the application for ancillary reliefs under s 51 of the 1976 Act even though the husband had converted to Islam before her petition for divorce had been filed in the High Court and that he had already commenced the proceedings in the Syariah Court (see para 15).

(4) (per **Nik Hashim FCJ**, **Azmel FCJ** concurring) The court was of the view that s 51(1) did not violate art 8 of the Federal Constitution and therefore was not void as complained. The classification created by s 51(1) was a reasonable classification as the persons in the non-converting category were treated equally as are persons in the converting category (see para 17); *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 2 MLJ 257.

(5) (per **Nik Hashim FCJ**, **Azmel FCJ** concurring) The status of the parties at the time of the marriage was the material consideration for the purpose of determining the question of jurisdiction. The husband could not shield himself behind the freedom of religion clause under art 11(1) of the FC to avoid his antecedent obligations under the 1976 Act on the ground that the civil court had no jurisdiction over him (*Kamariah bte Ali dan lain-lain v Kerajaan Negeri Kelantan dan satu lagi* [2005] 1 MLJ 197). A non-Muslim marriage did not automatically dissolve upon one of the parties conversion to Islam. Thus, by contracting the civil marriage, the husband and wife were bound by the 1976 Act in respect

to divorce and custody of the children of the marriage, and thus, the civil court continued to have jurisdiction over him, notwithstanding his conversion to Islam (see paras 18–19).

(6) (per **Nik Hashim FCJ**, **Azmel FCJ** concurring) The husband had converted to Islam and had filed the proceedings in the Syariah High Court for the dissolution of the marriage and the custody of the converted son. By embracing Islam, the husband and the son became subject to Muslim personal and religious laws and it was not an abuse of process if he, being a muslim, sought remedies in the Syariah High Court as it was his right to do so (see para 20).

(7) (per **Nik Hashim FCJ**, **Azmel FCJ** concurring) There was no impediment for the converted spouse, ie the husband, to appear in the divorce proceeding in the High Court albeit as a respondent, as the jurisdiction of the High Court extended to him unlike the Syariah High Court which restricts its jurisdiction to persons professing the religion of Islam only, for example under section 46(2)(b) of the Administration of Islamic Law (Federal Territories) Act 1993 ('the 1993 Act') where in its civil jurisdiction relating to marriage and custody, the Syariah High Court should have the jurisdiction to hear and determine the action in which all the parties are muslims. The wife, being a non-muslim, had no locus in the Syariah court (see para 22).

(8) (per **Nik Hashim FCJ**) Both civil and Syariah Courts were creatures of statutes such as the Federal Constitution ('FC'), the acts of parliament and the state enactments. These two courts were administered separately and they were independent of each other. Although the Syariah Courts were state courts they were not lower in status than the civil courts. This recognition of the Syariah Courts was largely due to art 121 (1A) of the FC which excluded the jurisdiction of the civil courts on any matter within the jurisdiction of the Syariah Courts (see para 23).

(9) (per **Nik Hashim FCJ**, **Azmel FCJ** concurring) With the separation of the jurisdictions, the respective court could not interfere with each other's jurisdiction. Thus, the civil court could not be moved to injunct a validly obtained order of a Syariah Court of competent jurisdiction. The injunction obtained by the wife, although addressed to the husband, was in effect a stay of proceedings of the husband's applications in the Syariah High Court and this amounted to an interference by the High Court of the husband's exercise of his right as a muslim to pursue his remedies in the Syariah High Court. Obviously, the law did not permit such an interference (see para 24).

(10)(per **Nik Hashim FCJ**, **Azmel FCJ** concurring) Either husband or wife had the right to convert a child of the marriage to Islam. The word

'parent' in art 12(4) of the FC, which stated that the religion of a person under the age of 18 years shall be decided by his parent or guardian, means a single parent. Therefore, art 12(4) must not be read as entrenching the right to choice of religion in both parents (see para 26).

(11)(per **Nik Hashim FCJ**, **Azmel FCJ** concurring) The High Court was entitled to grant an Erinford injunction even though it had held that it had no jurisdiction to grant the substantive interim injunction (*Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448; *Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan* [1986] 2 MLJ 39; *Celcom (Malaysia) Bhd v Inmiss Communication Sdn Bhd* [2003] 3 MLJ 178). Hence, the majority decision of the Court of Appeal setting aside the Erinford injunction was erroneous and to that extent the appeal must be allowed. The order of the Court of Appeal was therefore set aside and the order of the High Court granting the Erinford injunction was restored (see para 28).

(12)(per **Nik Hashim FCJ**, **Azmel FCJ** concurring) With regard to the granting of the Erinford injunction pending the wife's application for leave to appeal to the Federal Court, the court agreed with the majority decision of the Court of Appeal that it had the jurisdiction to grant the wife's application. The issue concerning the jurisdictional point had been conclusively determined against the husband by the majority decision of the Court of Appeal in *Chong Wooi Leong & Ors v Lebbey Sdn Bhd (No 2)* [1998] 2 MLJ 661 where Abu Mansor JCA (later FCJ) considered it 'trite law that a court which has given judgment certainly has the power to order stay' (see para 29).

(13)(per **Abdul Aziz Mohamad FCJ**, agreeing with majority) On the question of prematurity which arose from the proviso to s 51(1) of the 1976 Act which prohibits the presentation of a petition under s 51 'before the expiration of the period of three months from the date of the conversion', according to s 107 of the Selangor Enactment, the only requirements for a valid conversion to Islam were the uttering by the person concerned, in reasonably intelligible Arabic, of his own free will, of the two clauses of the Affirmation of Faith, with awareness of their meaning. No witnesses or documentation were necessary for a valid conversion, although witnesses would certainly be useful in case the fact of conversion was disputed. Registration was not compulsory. The court was unable to agree with the wife's submission that even if the proviso operated on the petition, it operated only to disqualify the prayer for dissolution of the marriage but not the prayers for custody, maintenance and a share of the marital home, which the wife, therefore, could still proceed with. According to subsection (2) of s 51, those

reliefs could only be granted upon dissolution of the marriage. They could not be granted independently of the dissolution of the marriage (see paras 59–61). A

(14)(per **Abdul Aziz Mohamad FCJ**, agreeing with majority) The court could also not agree with the wife's reliance on r 102 of the Divorce and Matrimonial Proceedings Rules 1980 made under the 1976 Act in the event that the petition was held to be caught by the proviso to s 51(1). Rule 102 did not concern non-compliance with the Act itself, much less with non-compliance with the proviso to s 51(1), which laid down a condition in strict prohibitory terms for the presentation of a petition under s 51. The proviso was part of s 51(1). The right to petition was subjected to the proviso. The proviso governed that right. The word 'shall' was part of the clause 'no petition under this section shall be presented', which was of a prohibitory nature (see para 62). B C D

(15)(per **Abdul Aziz Mohamad FCJ**, agreeing with majority) In this case, however, where the interim injunction was sought under O 29 of the Rules of the High Court 1980, the injunction that was of concern was the injunction against proceedings, the injunction against conversion being in any case incapable of falling within s 54(b) of the Specific Relief Act 1950 because conversion did not involve the Syariah Courts. The petition for divorce did not seek any perpetual injunction against proceedings. The interim injunction that was sought was to preserve the status quo pending the disposal of the petition for divorce with its prayers for custody of children, maintenance, and a share of the marital home. Therefore *Vethanayagam v Karuppiah & Ors* [1968] 1 MLJ 283 and s 54(b) did not apply in this case to disallow the grant of the interim injunction (see para 88). E F G

(16)(per **Abdul Aziz Mohamad FCJ**, dissenting) Section 46(2) of the 1984 Act did not enable a Syariah Court to bring about a dissolution of a non-muslim marriage where a party to it had converted to Islam. It was obvious from the very wording of the section that it was predicated on the supposition that in Islamic law the conversion of a party to Islam by itself might or did operate to dissolve the marriage. The section prevents that supposition from having a legal effect unless and until it was confirmed by the syariah court. What the Syariah Court did under the section was merely to confirm that the conversion had operated to dissolve the marriage. The Syariah Court did not do anything under s 46(2) to bring about dissolution of the marriage. It merely confirmed that a dissolution had taken place by reason of conversion. The court agreed with the wife that s 46(2) did not confer jurisdiction on the Syariah Courts to dissolve a non-muslim marriage. In relation to that H I

section, therefore, cl (1A) of art 121 of the Federal Constitution did not apply to deprive the High Court of jurisdiction under s 51 of the 1976 Act (see para 144).

(17)(per **Abdul Aziz Mohamad FCJ**, dissenting) It was an abuse of process for the converted spouse to file custody proceedings in the Syariah Courts in respect of the children of the 1976 Act, primarily because the Syariah Courts had no jurisdiction in the matter of the custody of children of a non-Muslim marriage (see para 148).

(18)(per **Abdul Aziz Mohamad FCJ**, dissenting) The power to make ancillary orders must be looked for in paragraph (b) of s 46(2) of the 1984 Act or elsewhere in the 1984 Act, but the power under that paragraph was only in relation to Muslim marriages and the husband had not shown any other provision of the 1984 Act that enabled the Syariah Court to make ancillary orders in cases under s 46(2) of that Act (see para 146).

(19)(per **Abdul Aziz Mohamad FCJ**, dissenting) (although agreeing on the meaning of parent) The ordinary meaning of 'parent' is 'a father or mother'. The relevant phrase in art 12(4) of the Federal Consitution had, therefore, to be read as 'by his father or mother or guardian'. But that did not mean that the other parent had no right to object or to prevent his child from being taught that religion or being converted to Islam. While the conversion of a child was valid, at least in Kuala Lumpur, with the consent of one parent, the other parent had the right to object to the conversion and to seek an interim injunction to prevent the conversion until his or her objection was adjudicated upon. An interim injunction against conversion ought to be granted in this case (see paras 156 & 163).

[Bahasa Malaysia summary

Pihak-pihak telah berkahwin pada 26 Julai 2001, perkahwinan mereka telah diupacarakan dan didaftarkan di bawah Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta 1976 tersebut'). Sebagai penganut agama Hindu, mereka telah meraikan upacara perkahwinan mengikut adat resam Hindu pada 9 Mac 2002. Terdapat dua kanak-kanak daripada perkahwinan tersebut, kedua-duanya anak lelaki: Dharvin Joshua berumur 4 tahun dan Sharvin berumur 2 tahun. Pada 18 Mei 2006, Pertubuhan Kebajikan Islam Malaysia ('PERKIM') telah mengesahkan bahawa pada hari tersebut si suami dan anak Dharwin telah memeluki agama Islam di ibu pejabat PERKIM. Sijil pemelukan agama (di mana ia perlu dikeluarkan kepada setiap mualaf mengikut s 112 Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 (No 1, 2003)) menyatakan 18 Jun 2006 sebagai tarikh penukaran agama. Si suami telah memfailkan satu permohonan

di Mahkamah Tinggi syariah pada 23 Mei 2006 mengikut s 46(2) Akta Undang-Undang Keluarga Islam (Wilayah-Wilayah Persekutuan) 1984 (Akta 303) ('Akta 1984 tersebut') untuk pembubaran perkahwinan dan hak penjagaan anak lelaki sulung. Satu hak penjagaan interim berhubungan dengan anak mualaf telah dikeluarkan kepada si suami oleh Mahkamah Tinggi Syariah. Pada 4 Ogos 2006, si isteri telah memfailkan satu petisyen untuk pembubaran perkahwinannya mengikut s 51 Akta Membaharui Undang-Undang bersama dengan permohonan untuk hak penjagaan dan relif-relif sampingan di Mahkamah Tinggi. Si isteri tidak membantah pemelukan suaminya kepada agama Islam. Sementara itu, si isteri telah memohon dan memperolehi injunksi ex parte terhadap si suami. Si suami kemudiannya telah memfailkan satu permohonan untuk mengenepikan injunksi tersebut. Mengikut satu pendengaran inter partes, Mahkamah Tinggi telah menolak permohonan si isteri dan membenarkan permohonan si suami untuk mengenepikan injunksi tersebut. Akan tetapi Mahkamah Tinggi telah memberikan injunksi interim Erinford sementara menunggu rayuan ke Mahkamah Rayuan. Pada 13 Mac 2007 Mahkamah Rayuan melalui satu majoriti telah mengekalkan keputusan Mahkamah Tinggi dalam menolak permohonan si isteri untuk satu injunksi tetapi membenarkan rayuan si suami terhadap pemberian injunksi Erinford oleh Mahkamah Tinggi. Kini terdapat dua rayuan-rayuan oleh si isteri terhadap keputusan-keputusan Mahkamah Rayuan. Pada 30 Mac 2007 dalam suatu usul oleh si isteri, panel Mahkamah Rayuan yang sama melalui satu majoriti telah membenarkan satu injunksi Erinford sementara menunggu permohonannya untuk kebenaran merayu ke Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan. Si suami merayu terhadap keputusan tersebut.

Diputuskan, menolak injunksi si isteri, membenarkan rayuan si isteri dalam membenarkan injunksi Erinford oleh Mahkamah Tinggi dan menolak rayuan si suami membenarkan injunksi Erinford sementara menunggu rayuan ke Mahkamah Persekutuan:

(1) (oleh **Nik Hashim HMP**) Proviso s 51(1) kepada Akta 1976 dengan jelas mencerminkan keperluan imperatif yang harus dipatuhi sebelum satu petisyen untuk perceraian dapat dilakukan. Mengikut terma-termanya, proviso tersebut memperuntukkan satu kaveat atas si isteri untuk tidak memfailkan petisyen perceraian sehingga luputnya tiga bulan daripada tarikh si suami memeluk agama Islam. Ia adalah kewajipan mahkamah untuk memberikan kesan kepada perkataan-perkataan yang digunakan oleh badan perundangan. Dengan itu kecuali proviso tersebut dipatuhi, Mahkamah Tinggi tidak mempunyai bidang kuasa untuk melayan petisyen si isteri (lihat perenggan 11).

(2) (oleh **Nik Hashim HMP**) Dalam pandangan mahkamah, si isteri adalah berhak untuk meneruskan dengan permohonan seterusnya tetapi ia adalah sesuai sekiranya beliau memfailkan petisyen perceraiannya sekali lagi di bawah s 51 bersama dengan relif-relif sampingan oleh kerana mahkamah akan memberikan relif-relif di bawah s 51(2) selepas pembubaran perkahwinan tersebut (lihat perenggan 13).

(3) (oleh **Nik Hashim HMP**) Jika dianggap bahawa petisyen si isteri dibuat dengan betul sebelum mahkamah, pandangan mahkamah ialah bahawa Mahkamah Tinggi akan mempunyai bidang kuasa untuk mendengar dan memutuskan petisyen untuk perceraian dan permohonan untuk relif-relif sampingan di bawah s 51 Akta 1976 tersebut walaupun si suami telah memeluk agama Islam sebelum petisyen perceraiannya telah difailkan di Mahkamah Tinggi dan bahawa si suami juga telah memulakan prosiding di Mahkamah Syariah (lihat perenggan 15).

(4) (oleh **Nik Hashim HMP**) Mahkamah berpendapat bahawa s 51(1) tidak melanggar perkara 8 Perlembagaan Persekutuan dan dengan itu adalah sah. Klasifikasi yang dibentuk oleh s 51(1) adalah klasifikasi yang munasabah oleh kerana orang-orang di kelas bukan-mualaf akan mendapat layanan yang sama seperti orang-orang di kelas mualaf (lihat perenggan 17); *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 2 MLJ 257.

(5) (oleh **Nik Hashim HMP**) Status pihak-pihak pada masa perkahwinan adalah pertimbangan material untuk tujuan memutuskan soal bidang kuasa. Si suami tidak boleh melindungi dirinya di sebalik klausa kebebasan beragama di bawah perkara 11(1) Perlembagaan Persekutuan untuk mengelakkan kewajipan dahulunya di bawah Akta 1976 tersebut atas alasan bahawa mahkamah sivil tidak mempunyai bidang kuasa ke atasnya (*Kamariah bte Ali dan lain-lain v Kerajaan Negeri Kelantan dan satu lagi* [2005] 1 MLJ 197). Sesuatu perkahwinan bukan-Islam tidak secara otomatik dibubarkan apabila salah seorang memeluk agama Islam. Dengan itu, dengan melalui satu perkahwinan sivil, si suami dan si isteri diikat dengan Akta 1976 tersebut berhubungan dengan perceraian dan hak jagaan kanak-kanak hasil perkahwinan, dan dengan itu, mahkamah sivil terus mempunyai bidang kuasa ke atasnya, walaupun ia telah memeluk agama Islam (lihat perenggan 18–19).

(6) (oleh **Nik Hashim HMP**) Si suami telah memeluk agama Islam dan telah memfailkan prosiding di Mahkamah Tinggi syariah untuk pembubaran perkahwinan tersebutdan hak penjagaan anak mualaf tersebut. Dengan memeluki agama Islam, si suami dan anak tersebut telah menjadi tertakluk kepada undang-undang persendirian dan agama Islam dan ia bukanlah satu penyalahan proses mahkamah sekiranya,

beliau, sebagai seorang Islam, menuntut remedi-remedi di Mahkamah Tinggi syariah oleh kerana ia adalah haknya untuk berbuat demikian (lihat perenggan 20). A

(7) (oleh **Nik Hashim HMP**) Tiada halangan untuk pasangan mualaf, iaitu si suami, menghadirkan diri di prosiding perceraian Mahkamah Tinggi walaupun sebagai seorang responden, oleh kerana bidang kuasa Mahkamah Tinggi melibatkannya tidak seperti Mahkamah Tinggi syariah yang menghadkan bidang kuasa mereka kepada orang-orang yang beragama Islam sahaja, contohnya di bawah s 46(2)(b) Pentadbiran Undang-undang Islam (Wilayah-Wilayah Persekutuan 1993 ('Akta 1993 tersebut') di mana dalam bidang kuasa sivilnya berhubungan dengan perkahwinan dan hak penjagaan, Mahkamah Tinggi syariah akan mempunyai bidang kuasa untuk mendengar dan memutuskan tindakan di mana kesemua pihak-pihak adalah beragama Islam. Si isteri, seorang yang bukan Islam, tidak mempunyai locus di Mahkamah Syariah (lihat perenggan 22). B C D

(8) (oleh **Nik Hashim HMP**) Kedua-dua mahkamah sivil dan syariah adalah dibentuk oleh statut-statut seperti Perlembagaan Persekutuan (PP), akta-akta Parlimen dan Enakmen-enakmen Negeri. Kedua-dua mahkamah ini ditadbirkan secara berasingan dan bebas antara satu sama lain. Walaupun mahkamah-mahkamah syariah adalah mahkamah-mahkamah negeri, status mereka bukanlah lebih bawah daripada mahkamah-mahkamah sivil. Pengiktirafan ini oleh mahkamah-mahkamah syariah adalah disebabkan pada keseluruhannya kepada perkara 121 (1A) PP yang mengecualikan bidang kuasa mahkamah-mahkamah sivil dalam apa-apa perkara dalam bidang kuasa mahkamah-mahkamah syariah (lihat perenggan 23). E F

(9) (oleh **Nik Hashim HMP**) Dengan bidang kuasa yang berlainan, mahkamah-mahkamah masing-masing tidak boleh campur tangan dengan bidang kuasa antara satu sama lain. Dengan itu, mahkamah sivil tidak boleh bertindak untuk menginjunksikan satu perintah yang diperolehi secara sah di Mahkamah Syariah dengan bidang kuasa yang kompeten. Injunksi yang diperolehi oleh si isteri, walaupun dialamatkan kepada si suami, sebenarnya mempunyai kesan satu penggantungan prosiding permohonan si suami ke Mahkamah Tinggi syariah dan ini membentuk satu campur tangan oleh Mahkamah Tinggi akan hak si suami menggunakan haknya sebagai seorang Islam untuk memperolehi remedi-remedinya di Mahkamah Tinggi syariah. Dengan jelas, undang-undang tidak membenarkan campur tangan sebegini (lihat perenggan 24). G H I

(10)(oleh **Nik Hashim HMP**) Sama ada suami atau isteri mempunyai hak untuk menukarkan agama seseorang anak daripada perkahwinan tersebut ke Islam. Perkataan 'parent' di Perkara 12(4) PP, yang

menyatakan bahawa keagamaan seseorang di bawah umur 18 tahun akan ditentukan oleh ibu/bapa atau penjaga, bermaksud seorang ibu atau bapa. Dengan itu perkara 12(4) tidak sepatutnya dibaca sebagai termaktub hak memilih agama kepada kedua-dua ibu bapa (lihat perenggan 26).

(11)(oleh **Nik Hashim HMP**) Mahkamah Tinggi berhak memberikan injunksi Erinford walaupun ia telah memutuskan bahawa ia tiada bidang kuasa untuk memberikan injunksi interim yang substantif (*Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448; *Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan* [1986] 2 MLJ 39; *Celcom (Malaysia) Bhd v Inmiss Communication Sdn Bhd* [2003] 3 MLJ 178). Dengan itu, keputusan majoriti Mahkamah Rayuan dalam mengenepikan injunksi Erinford adalah salah dan setakat itu rayuan harus dibenarkan. Perintah Mahkamah Rayuan dengan ini diketepikan dan perintah Mahkamah Tinggi dalam memberikan injunksi Erinford dikembalikan (lihat perenggan 28).

(12)(oleh **Nik Hashim HMP**) Berhubungan dengan pemberian injunksi Erinford sementara menunggu permohonan si isteri untuk kebenaran merayu ke Mahkamah Persekutuan, mahkamah bersetuju dengan keputusan majoriti Mahkamah Rayuan bahawa ia mempunyai bidang kuasa untuk membenarkan permohonan si isteri. Isu berhubungan dengan bidang kuasa telahpun diputuskan secara muktamad terhadap si suami oleh keputusan majoriti Mahkamah Rayuan di kes *Chong Wooi Leong & Ors v Lebbey Sdn Bhd (No 2)* [1998] 2 MLJ 661 di mana Abu Mansor HMR (kemudiannya HMP) mempertimbangkan bahawa ia adalah 'trite law that a court which has given judgment certainly has the power to order stay' (lihat perenggan 29).

(13)(oleh **Abdul Aziz Mohamad HMP**, bersetuju dengan keputusan majoriti) Atas soalan pramasa yang berbangkit daripada proviso kepada s 51(1) Akta 1976 tersebut yang menghalang petisyen difailkan di bawah s 51 'before the expiration of the period of three months from the date of the conversion', mengikut s 107 Enakmen Selangor, keperluan-keperluan yang hanya diperlukan untuk pertukaran yang sah ke agama Islam adalah dengan orang yang berkenaan, atas kerelaannya sendiri, mengucapkan dua kalimah syahadat dan mengetahui maksudnya sekali. Tiada keperluan saksi-saksi atau dokumen untuk satu penukaran, walaupun saksi-saksi adalah berguna dalam kes di mana penukaran dipertikaikan. Pendaftaran adalah tidak perlu. Mahkamah tidak dapat bersetuju dengan hujahan si isteri bahawa walaupun proviso digunakan kepada petisyen tersebut, ia hanya digunakan untuk tidak melayakkan permohonan untuk pembubaran

perkahwinan tersebut tetapi bukan untuk permohonan untuk hak penjagaan, nafkah dan satu bahagian rumah perkahwinan tersebut, yang mana si isteri, dengan itu masih boleh meneruskan dengan tindakan tersebut. Mengikut subseksyen (2) s 51, relif-relif tersebut hanya boleh diberikan selepas perkahwinan dibubarkan. Mereka tidak boleh diberikan secara berasingan daripada pembubaran perkahwinan tersebut (lihat perenggan 59–61).

(14)(oleh **Abdul Aziz Mohamad HMP**, bersetuju dengan keputusan majoriti) Mahkamah juga tidak dapat bersetuju dengan si isteri yang bergantung kepada kaedah 102 Kaedah-Kaedah Prosiding Penceraian dan Hal Ehwal Suami Isteri 1980 yang dibuat di bawah Akta 1976 tersebut sekiranya petisyen dikatakan tidak sah mengikut proviso s 51(1). Kaedah 102 tidak berkaitan dengan ketidakpatuhan Akta tersebut, apa lagi dengan ketidakpatuhan proviso s 51(1), yang mensyaratkan terma-terma larangan sama sekali pemfailan satu petisyen di bawah s 51. Proviso itu adalah sebahagian s 51(1). Hak untuk mempetisyen adalah tertakluk kepada proviso. Proviso tersebut mengawal hak tersebut. Perkataan 'shall' adalah sebahagian klausa 'no petition under this section shall be presented', yang bersifat larangan (lihat perenggan 62).

(15)(oleh **Abdul Aziz Mohamad HMP**, bersetuju dengan keputusan majoriti) Akan tetapi, dalam kes ini, di mana injunksi interim yang dituntut di bawah Aturan 29 Kaedah-kaedah Mahkamah Tinggi 1980, injunksi berkenaan adalah injunksi terhadap prosiding-prosiding, injunksi terhadap penukaran walaubagaimanapun adalah tidak dapat dipakai di dalam s 54(b) Akta Relif Spesifik 1950 oleh kerana penukaran tidak melibatkan mahkamah-mahkamah syariah. Petisyen perceraian tidak menuntut sebarang injunksi kekal terhadap prosiding-prosiding. Injunksi interim yang dituntut adalah untuk mengekalkan status quo sementara penyelesaian petisyen perceraian dengan permohonan-permohonan untuk hak penjagaan kanak-kanak, nafkah dan sebahagian rumah perkahwinan tersebut. Dengan itu, kes V*Vethanayagam v Karuppiah & Ors* [1968] 1 MLJ 283 dan s 54(b) tidak terpakai di dalam kes ini untuk tidak membenarkan pemberian injunksi interim (lihat perenggan 88).

(16)(oleh **Abdul Aziz Mohamad HMP** menentang) Seksyen 46(2) Akta 1984 tersebut tidak membolehkan Mahkamah Syariah untuk membubarkan perkahwinan bukan Islam di mana salah satu pihak telah memeluk agama Islam. Ia adalah jelas daripada perkataan seksyen tersebut sendiri bahawa ia adalah berdasarkan satu anggapan bahawa di undang-undang Islam seseorang yang menukarkan agamanya kepada Islam dengan secara sendirinya mungkin atau dapat membubarkan perkahwinan. Seksyen tersebut menghalang anggapan daripada

mempunyai efek undang-undang kecuali dan sehingga ia disahkan oleh Mahkamah Syariah. Apa yang Mahkamah Syariah lakukan di bawah seksyen tersebut ialah hanya mengesahkan bahawa penukaran tersebut telah beroperasi untuk membubarkan perkahwinan tersebut. Mahkamah Syariah tidak melakukan apa-apa di bawah s 46(2) untuk membawa kepada pembubaran perkahwinan. Ia hanya mengesahkan bahawa satu pembubaran telah berlaku yang disebabkan oleh penukaran. Mahkamah bersetuju dengan si isteri bahawa s 46(2) tidak memberikan bidang kuasa kepada Mahkamah Syariah untuk membubarkan perkahwinan bukan Islam. Berhubungan dengan seksyen tersebut, maka klausa (1A) Perkara 121 Perlembagaan Persekutuan tidak terpakai untuk merampas bidang kuasa Mahkamah Tinggi di bawah s 51 Akta 1976 tersebut (lihat perenggan 144).

(17)(oleh **Abdul Aziz Mohamad HMP** menentang) Ia adalah penyalahan proses untuk pasangan yang telah bertukar agama untuk memfailkan prosiding hak penjagaan di mahkamah-mahkamah syariah berhubungan dengan kanak-kanak di Akta 1976, oleh kerana mahkamah-mahkamah syariah tidak mempunyai bidang kuasa di dalam perkara hak penjagaan kanak-kanak perkahwinan bukan Islam (lihat perenggan 148).

(18)(oleh **Abdul Aziz Mohamad HMP** menentang) Kuasa untuk memberi perintah-perintah sampingan harus dilihat di dalam perenggan (b) s 46(2) Akta 1984 tersebut atau di lain-lain seksyen di Akta tersebut, tetapi kuasa di bawah perenggan tersebut adalah berhubungan dengan perkahwinan-perkahwinan Islam sahaja dan si suami tidak dapat menunjukkan sebarang peruntukan lain di Akta 1984 tersebut yang membolehkan Mahkamah Syariah memberikan perintah-perintah sampingan di kes-kes di bawah s 46(2) Akta tersebut (lihat perenggan 146).

(19)(oleh **Abdul Aziz Mohamad HMP** menentang) (meskipun bersetuju dengan maksud 'parent') Perkataan maksud asal 'parent' adalah 'a father or mother'. Frasa yang relevan di perkara 12(4) Perlembagaan Persekutuan telah, dengan itu, patut dibaca sebagai 'by his father or mother or guardian'. Tetapi ini tidak bermaksud bahawa seorang lagi ibu atau bapa tidak mempunyai hak untuk membantah ataupun menghalang anaknya daripada diajar agama tersebut ataupun menukarkan agamanya kepada Islam. Sementara penukaran seseorang anak adalah sah, di Kuala Lumpur, dengan kebenaran salah seorang ibu atau bapa, ibu atau bapa yang lagi satu mempunyai hak membantah terhadap penukaran tersebut dan menuntut satu injunksi interim untuk menghalang penukaran tersebut sehingga bantahannya diputuskan. Satu injunksi interim terhadap penukaran patut dibenarkan di dalam kes ini (lihat perenggan 156 & 163).]

Notes

For cases on divorce proceedings, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4400–4402.

For cases on Erinford injucntion, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2939–2947.

For cases on interim injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3115–3187.

For cases on matrimonial matters, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 553–560.

For cases on minor's religion, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3042–3044.

For cases on Syariah Court jurisdiction, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 561–589.

Cases referred to

Abdul Sheik Md Ibrahim & Anor v Hussein Ibrahim & Ors [1999] 3 CLJ 539 (refd)

Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize [2003] 1 WLR 2839 (refd)

Bina Satu Sdn Bhd v Tan Construction [1988] 1 MLJ 533 (refd)

Celcom (Malaysia) Bhd v Inmiss Communication Sdn Bhd [2003] 3 MLJ 178 (refd)

Che Omar bin Che Soh v Public Prosecutor [1988] 2 MLJ 55 (refd)

Chong Wooi Leong & Ors v Lebbey Sdn Bhd (No 2) [1998] 2 MLJ 661 (refd)

Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1 (refd)

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd [2004] 2 MLJ 257 (refd)

Dato' Param Cumaraswamy v MBF Capital Bhd & Anor [1997] 3 MLJ 824 (refd)

Erinford Properties Ltd v Cheshire County Council [1974] 2 All ER 448 (refd)

Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah ibni Almarhum Sultan Abu Bakar Ri'Ayatuddin Al Mu'Adzam Shah (sued in his personal capacity) [1996] 1 MLJ 617 (refd)

Federal Hotel Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers [1963] 1 MLJ 175 (refd)

Kamariah bte Ali dan lain-lain v Kerajaan Negeri Kelantan dan Satu lagi [2005] 1 MLJ 197 (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2007] 5 MLJ 101 (refd)

Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain [2007] 4 MLJ 585 (refd)

Majlis Agama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily Shaik Natar & Ors [2003] 3 MLJ 705 (refd)
Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman dan satu yang lain [1992] 2 MLJ 244 (refd)
Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur [1998] 1 MLJ 681 (refd)
Milton & Co v Ojha Automobile Engineering Co AIR 1931 Cal 279 (refd)
Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793 (refd)
Neduncheliyan V Uthiradam v Norshafiqah Mah Singai Annal & Ors [2005] 2 CLJ 306 (refd)
Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia [1988] 1 MLJ 302 (refd)
Saravanan a/l Thangathoray v Subashini a/p Rajasingam [2007] 2 MLJ 705 (refd)
Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong [1970] AC 1136 (refd)
Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah & Anor [2004] 2 MLJ 241 (refd)
Si Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd [1985] 1 MLJ 132 (refd)
Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd [2002] 4 MLJ 113 (refd)
Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam (Perkim) Kedah & Anor [1999] 1 MLJ 489 (refd)
Subashini a/p Rajasingam v Saravanan a/l Thangathoray [2007] 2 MLJ 798 (refd)
Subashini a/p Rajasingam v Saravanan a/l Thangathoray (No 2) [2007] 4 MLJ 97 (refd)
Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara, Malaysia & Anor [1999] 2 MLJ 241 (refd)
Tan Suan Choo v Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 (refd)
Tang Sung Mooi (f) v Too Miew Kim [1994] 3 MLJ 117 (refd)
Teoh Eng Huat v Kadhi, Pasir Mas & Anor [1990] 2 MLJ 300 (refd)
Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan [1986] 2 MLJ 39 (refd)
Vethanayagam v Karuppiah & Ors [1968] 1 MLJ 283 (refd)

Legislation referred to

Administration of the Religion of Islam (State of Selangor) Enactment 2003 (No 1 of 2003) ss 107–117, 111, 112, 117
Administration of Islamic Law (Federal Territories) Act 1993
Courts of Judicature Act 1964 ss 24(a), 44, 79, 80, 102
Divorce and Matrimonial Proceedings Rules 1980 r 102

Federal Constitution arts 3(1), 8(1), 11(1), 12, 121(1)(a), art 121(1A), Ninth Schedule, List II, item 1
Guardianship of Infant's Act 1961 (Act 351) ss 5, 11
Specific Relief Act 1877 [India] s 56
Islamic Family Law (Federal Territories) Act 1984 (Act 303) s 46(2)
Law Reform (Marriage and Divorce) Act 1976 (Act 164) ss 3(3), 51, 76, 77, 88, 93
Rules of the Court of Appeal 1994 r 76
Rules of the High Court 1980 O 29
Specific Relief (Malay States) Ordinance 1950 s 54(f)
Specific Relief Act 1950 (Act 137) ss 54(b), 50–55

Appeal from: Civil Appeals No W-02–955 of 2006 and W-02–1041 of 2006 (Court of Appeal, Putrajaya)

Malik Imtiaz Sarwar (Haris Mohd Ibrahim, K. Shanmuga, Fahri Azzar, Wee Thiam Seng with him) (Kanesalingam & Co) for the appellant in Civil Appeals No 02–19 of 2007 and 02–21 of 2007.

Mohamed Haniff Khatri Abdulla (Zainul Rijal Abu Bakar, Abdul Rahim Sinwan, Mohd Tajuddin Abdul Razak and Abdul Halim bin Bahari with him) (Zainul Rijal Talha & Amir) for the respondent.

Mohamed Haniff Khatri Abdulla (Zainul Rijal Abu Bakar, Abdul Rahim Sinwan, Mohd Tajuddin Abdul Razak and Abdul Halim bin Bahari with him) (Zainul Rijal Talha & Amir) for the appellant in Civil Appeal No 02–20 of 2007.

Malik Imtiaz Sarwar (Haris Mohd Ibrahim, K. Shanmuga, Fahri Azzar, Wee Thiam Seng with him) (Kanesalingam & Co) for the respondent.

Nik Hashim FCJ:

BACKGROUND

[1] There were three appeals (02–19–2007(W), 02–20–2007(W) and 02–21–2007(W)) before us and with the agreements of the parties, they were heard together.

[2] The parties to the three appeals were originally Hindus husband and wife; they were married pursuant to a civil ceremony of marriage that was registered on 26 July 2001 pursuant to the Law Reform (Marriage and Divorce) Act 1976 ('the 1976 Act'). There were two children of the marriage, both boys: Dharvin Joshua aged 4 and Sharvin aged 2. The husband converted himself and the elder son to Islam on 18 May 2006. Later, the wife received a notice dated 14 July 2006 from the Registrar of the Syariah High Court Kuala Lumpur informing her that her husband had commenced proceedings in the Syariah High Court for the dissolution of the marriage

A and custody of the elder son. He filed the application in the Syariah High Court on 23 May 2006. An interim custody order in respect of the converted son was issued to the husband by the Syariah High Court. On 4 August 2006, which was 2 months and 18 days after the husband's conversion and knowing that the husband had taken proceedings in the Syariah High Court, B the wife filed a petition for the dissolution of the marriage pursuant to s 51 of the 1976 Act coupled with an application for custody and ancillary reliefs in the High Court. The wife did not object to the husband's conversion to Islam.

C **[3]** Meanwhile, the wife applied for and obtained an ex parte injunction against the husband. The husband then filed an application to set aside the said injunction. Pursuant to an inter partes hearing, the High Court dismissed the wife's application and allowed the husband's application and set aside the said injunction. However, the High Court granted an interim D Erinford injunction pending an appeal to the Court of Appeal (see [2007] 2 MLJ 798).

[4] On 13 March 2007 the Court of Appeal by a majority upheld the High Court decision to dismiss the application by the wife for an injunction but E allowed the husband's appeal against the grant of the Erinford injunction by the High Court. Thus, there are two appeals (No 02–19–2007(W), No 02–21–2007(W)) by the wife against these decisions of the Court of Appeal (see [2007] 2 MLJ 705).

F **[5]** On 30 March 2007 on a motion by the wife, the same panel of the Court of Appeal by a majority allowed an Erinford injunction pending her application for leave to appeal to the Federal Court against the decision of the Court of Appeal. This decision is the subject matter of the husband's appeal before this court in Civil Appeal No 02–20–2007(W) (see [2007] 4 MLJ 97). G

THE QUESTIONS

[6] On 17 May 2007 the Federal Court unanimously granted leave to H appeal on the three appeals and continued the Erinford injunction until the disposal of these appeals. The main questions for determination by the Federal Court are as follows:

(1) Whether in an application for an interim injunction a court can make I a final determination on issues of law, in particular, where it refers to a question of jurisdiction, as opposed to a consideration of only the existence of a serious issue of law to be determined?

(2) If the answer to question number 1 is in the affirmative, then:

(2.1) In situations where one spouse in a marriage solemnized under the Law Reform (Marriage and Divorce) Act 1976 (a 'Law Reform Marriage') converts to Islam and the other does not, does the High Court or the Syariah Court have exclusive jurisdiction to grant decrees of divorce of such Law Reform Marriages and to make all other orders in respect of the division of matrimonial assets, the maintenance of spouse and of the children of the Law Reform Marriage ('children of the Law Reform Marriage'), the custody, care and control of the children of the Law Reform Marriage and all other matters incidental thereto?

(2.2) Further to question (2.1):

(2.2.1) are provisions such as s 46(2)(b)(i) of the Administration of Islamic Law (Federal Territories) Act 1993 (the '1993 Act') intended only to address marriages solemnized under the relevant State Islamic legislation ('Islamic marriages');

(2.2.2) as such, is the jurisdiction and/or power vested by such provisions in the Syariah Courts limited to the granting of decrees of divorce and orders consequential to such decrees pertaining to inter alia maintenance, custody, and child support in respect of Islamic marriages?

(2.3) In the event, the answers to questions 2.2.1 and 2.2.2 are in the affirmative, is it an abuse of process for the converted spouse to file custody proceedings in the Syariah Courts in respect of the children of the Law Reform Marriage?

(2.4) Is it an abuse of process for a spouse of a Law Reform Marriage to unilaterally convert the religion of a minor child of the Law Reform Marriage without the consent of the other parent.

(2.5.1) Is the High Court empowered to grant interlocutory relief aimed at preserving status quo in the course of disposing a petition under section 51 of the Law Reform (Marriage and Divorce) Act 1976?

(2.5.2) If so, can the High Court grant interim injunctions to prevent abuses of process having the effect of undermining the petition filed under section 51 of the Law Reform (Marriage and Divorce) Act 1976?

(2.6) Does Article 121(1A) of the Federal Constitution prevent the High Court from granting such interim injunctions where the abuse of process is effected through the jurisdictionally incompetent and deficient

(2.6.1) filing or proceedings in the Syariah Courts and/or

(2.6.2) unilateral conversion of a minor child of the Law Reform Marriage by the converted spouse?

(2.7) Can provisions such as section 53 of the 1993 Act be read as including within their ambit persons not professing the religion of Islam?

A QUESTIONS ON ERINFORD INJUNCTION

[7] Respecting the order of setting aside of the Erinford injunction by a majority decision of the Court of Appeal on 13 March 2007, and the order of granting the same on 30 March 2007 by a majority decision of the Court B of Appeal pending an application for leave to appeal to the Federal Court, the Federal Court granted leave to appeal on two questions:

(1) Where a court disallows an application for an interim injunction on the basis of a want of jurisdiction and the said decision is appealed, is the C court disentitled from granting an Erinford type of injunction?

(2) Does the Federal Court have exclusive jurisdiction to grant an Erinford type of injunction pending the hearing and disposal of an application for leave to appeal to the Federal Court or is it a concurrent jurisdiction exercisable by the Court of Appeal in the first instance? D

MAIN QUESTION NO (1)

[8] The question of whether a court, in an application for an interim E injunction, should decide the issue of jurisdiction as opposed to a decision of only the existence of a serious issue, depends on the facts of each case. Where the evidence upon which challenge to jurisdiction is made is of such a quality that renders a trial unnecessary, a court may proceed to make findings based upon that evidence, if not, the court may order the matter to F be tried (*Dato' Param Cumaraswamy v MBF Capital Bhd & Anor* [1997] 3 MLJ 824 (CA)). It must be noted that lack of jurisdiction has the consequence that the court has no right to enter upon the enquiry as to whether there exists a state of facts which would entitle the court to grant to the applicant the relief sought *(see Rediffusion (Hong Kong) Ltd v Attorney* G *General of Hong Kong* [1970)] AC 1136 (PC)).

[9] In the present case, the wife had obtained an ex-parte injunction. The husband applied to set aside the ex-parte injunction on the ground that the court was not seized with jurisdiction in light of art 121(1A) of the H Federal Constitution ('the FC'). The wife contends that the Article is not applicable. In such a conflict, the High Court and the Court of Appeal were correct in dealing with the issue of jurisdiction as a threshold issue and the parties had agreed to that approach. As such, my answer to the question is in the affirmative.

I MAIN QUESTIONS NO (2)–(2.7)

[10] Section 51 of the 1976 Act provides for dissolution of marriage on the ground of conversion to Islam. However it must be noted that it only

provides a ground for the other party who has not converted to petition for divorce. The section states: A

(1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce:Provided that no petition under this section *shall* be presented before the expiration of the period of *three months from the date of conversion.* B

(2) The court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and may, attach any conditions to the decree of the dissolution as it thinks fit. C

(Emphasis added.)

[11] It was contended by learned counsel for the wife that the word 'shall' appearing in the proviso is directory. With respect, I do not agree. D The proviso to s 51(1) of the 1976 Act clearly reflects the imperative requirement which must be complied with before a petition for divorce can be made. By its terms, the proviso imposes a caveat on the wife not to file the petition for divorce until a lapse of 3 months from the date of the husband's conversion to Islam. The three months period is incorporated into the proviso E probably to provide for the 'iddah' period. Be that as it may, it is the duty of the court to give effect to the words used by the legislature. Thus, in my judgment, unless the proviso is complied with, the High Court would not have the jurisdiction to entertain the wife's petition. F

[12] In the present case, it is clear from the evidence that the husband converted himself and the elder son to Islam on 18 May 2006. The certificates of conversion to Islam issued to them under s 112 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 G conclusively proved the fact that their conversion took place on 18 May 2006. Thus, I respectfully agree with Hassan Lah JCA that the wife's petition was filed in contravention of the requirement under the proviso to s 51(1) of the 1976 Act in that it was filed 2 months and 18 days short of 3 months after the husband's conversion to Islam. It follows therefore that the petition was H premature and invalid and the summons-in-chambers, ex parte and inter parte based on the petition which were filed therein were also invalid.

[13] Learned counsel for the wife also submitted that notwithstanding the finding that the petition for divorce was invalid for failure to comply with the I proviso to s 51(1) of the 1976 Act, the wife is still entitled to proceed with the application regarding custody pursuant to s 88 and ancillary reliefs under ss 77 and 93 of the 1976 Act. In my view, the wife is entitled to proceed with the rest of the application but it would be most appropriate if she files her

petition for divorce afresh under s 51 coupled with an application for ancillary reliefs as the court would grant the reliefs under s 51(2) upon dissolution of the marriage.

[14] On finding that the wife's petition for divorce was invalid, is it still necessary for this court to answer the questions posed? I would answer the questions nevertheless as the questions are questions of importance upon which a decision of the Federal Court would be to public advantage.

[15] Assuming that the wife's petition was properly before the court ie it was filed three months after the conversion, then my view is that the High Court would have the jurisdiction to hear and determine the petition for divorce and the application for ancillary reliefs under s 51 of the 1976 Act even though the husband had converted to Islam before her petition for divorce had been filed in the High Court and that he had already commenced the proceedings in the Syariah Court. In *Tang Sung Mooi (f) v Too Miew Kim* [1994] 3 MLJ 117 the then Supreme Court (Abdul Hamid LP, Gunn Chit Tuan CJ (Malaya), Edgar Joseph Jr, Eusoff Chin and Mohamed Dzaiddin SCJJ) at p 124 said:

> Under s 51, where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce and the court upon dissolving the marriage may make provision for the wife or husband and for the support, care and custody of the children of the marriage and may attach any condition to the decree of dissolution. The legislature, by enacting s 51, clearly envisaged a situation that where one party to non-Muslim marriage converted to Islam, the other party who has not converted may petition to the High Court for divorce and seek ancillary reliefs. Further, it would seem to us that Parliament, in enacting subsection 51(2), must have had in mind to give protection to non-Muslim spouses and children of the marriage against a Muslim convert.

[16] It must be noted also that the High Court had exercised its civil jurisdiction in this matter under s 24(a) of the Courts of Judicature Act 1964 which states that the jurisdiction of the High Court shall include the jurisdiction under any written law relating to divorce and matrimonial causes. The phrase 'any written law relating to divorce and matrimonial causes' must include the 1976 Act.

[17] On the complaint by learned counsel for the husband that the provision under s 51(1) of the 1976 Act is unjust and ultra vires art 8(1) of the FC and therefore void for it only allows the unconverted non-Muslim spouse to become the petitioner in a divorce petition and an applicant in ancillary relief applications, whereas the converted Muslim spouse under the provision is compelled to remain as a respondent in such petition or application, I am of the view that s 51(1) does not violate art 8 of the FC and

therefore is not void as complained. The classification created by s 51(1) is a reasonable classification as the persons in the non-converting category are treated equally as are persons in the converting category (see *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 2 MLJ 257).

[18] I agree with learned counsel for the wife that the status of the parties at the time of the marriage is the material consideration for the purpose of determining the question of jurisdiction. In *Kamariah bte Ali dan lain-lain v Kerajaan Negeri Kelantan dan satu lagi* [2005] 1 MLJ 197, the appellants claimed by a statutory declaration that they were no longer Muslims in August 1998. They were sentenced to imprisonment on 5 October 2000 for failure to abide by the order of the Syariah Court of Appeal relating to the offence under Undang-Undang Majlis Agama Islam dan Adat Istiadat Melayu Kelantan which they had committed before August 1998. The appellants contended that as they were no longer Muslims, the Syariah Court had no jurisdiction over them. Therefore, the issue was whether the appellants must be Muslims when they were sentenced in October 2000. In resolving the issue, the Federal Court (Ahmad Fairuz Chief Justice, Mohd Noor Ahmad, PS Gill Rahmah Hussain FCJJ and Richard Malanjum JCA (as he then was)) concluded that notwithstanding their claim to no longer being Muslims, the material time for determining the question of jurisdiction was the time when the offence were committed and at that time the appellants were Muslims. In concluding that the addressStreetSyariah Court had the jurisdiction, the Federal Court observed:

> Oleh yang demikian, persoalan yang timbul ialah sama ada perkara-perkara perayu-perayu mestilah menganut agama Islam ketika hukuman-hukuman dijatuhi ke atas mereka dalam bulan Oktober 2000 itu adalah relevan atau penentu (crucial). Perlu diingat bahawa kesalahan terhadap mana perayu-perayu dihukum adalah dilakukan oleh perayu-perayu sebelum mereka membuat akuan berkanun mengisytiharkan mereka keluar dari agama Islam.

The Federal Court then continued:

> … Mahkamah berpendapat bahawa masa yang material untuk menentukan sama ada perayu-perayu adalah orang yang menganut agama Islam ialah masa ketika mana perayu-perayu melakukan kesalahan … Jika pendekatan maksud tidak diambil, orang-orang Islam yang menghadapi tuduhan di Mahkamah Syariah boleh sewenang-wenangnya menimbulkan pembelaan yang mereka bukan lagi seorang yang menganut agama Islam dan dengan demikian tidak tertakluk kepada bidang kuasa Mahkamah Syariah. Keadaan sebegini akan menjejaskan pentadbiran Undang-Undang Islam di Malaysia dan mungkin juga undang-undang agama lain.

[19] Thus, by analogy, the above principle applies to our case. The husband could not shield himself behind the freedom of religion clause under

art 11(1) of the FC to avoid his antecedent obligations under the 1976 Act on the ground that the civil court has no jurisdiction over him. It must be noted that both the husband and wife were Hindus at the time of their marriage. Therefore, the status of the husband and wife at the time of registering their marriage was of material importance, otherwise the husband's conversion would cause injustice to the unconverted wife including the children. A non-Muslim marriage does not automatically dissolve upon one of the parties converted to Islam. Thus, by contracting the civil marriage, the husband and wife were bound by the 1976 Act in respect to divorce and custody of the children of the marriage, and thus, the civil court continues to have jurisdiction over him, notwithstanding his conversion to Islam.

[20] But in the present case, the husband had converted to Islam and had filed the proceedings in the Syariah High Court for the dissolution of the marriage and the custody of the converted son. By embracing Islam, the husband and the son became subject to Muslim personal and religious laws and it is not an abuse of process if he, being a Muslim, seeks remedies in the Syariah High Court as it is his right to do so.

[21] Section 46(2) of the Islamic Family Law (Federal Territories) Act 1984 ('the 1984 Act') states:

> The conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the court.

The act of confirmation of the dissolution of the marriage under the section is not a mere administrative act as understood by the Court of Appeal, but a full judicial proceeding before the Syariah High Court as it happened in Dalam Perkara Permohonan Perisytiharan Pembubaran Perkahwinan Disebabkan Pertukaran Agama — Permohonan Siti Aisyah Janthip Aisam, JHXXI/11 (1427H) 262, where the Syariah High Court Kuala Terengganu after evaluating the evidence and applying the Hukum Syarak, allowed the wife's application to dissolve her Buddhist civil marriage to the husband pursuant to s 43(2) Enakmen Undang-Undang Pentadbiran Keluarga Islam (Negeri Terengganu) 1985, which is equivalent to s 46(2) of the 1984 Act. It appears from the case that the husband did not contest the application and neither a decree of divorce granted under s 51 of the 1976 Act by the High Court was ever produced in the Syariah Court. To my mind, the dissolution order of the civil marriage by the Syariah High Court by virtue of conversion would have no legal effect in the High Court other than as evidence of the fact of the dissolution of the marriage under the Islamic law in accordance with Hukum Syarak. Thus, the non-Muslim marriage between the husband and wife remains intact and continues to subsist until the High Court dissolves it pursuant to a petition for divorce by the unconverted spouse under s 51(1) of the 1976 Act.

[22] In the present case, there is no impediment for the converted spouse, ie the husband, to appear in the divorce proceeding in the High Court albeit as a respondent, as the jurisdiction of the High Court extends to him unlike the Syariah High Court which restricts its jurisdiction to persons professing the religion of Islam only, for example under s 46(2)(b) of the Administration of Islamic Law (Federal Territories) Act 1993 (the 1993 Act) where in its civil jurisdiction relating to (i) marriage and (iii) custody, the Syariah High Court shall have the jurisdiction to hear and determine the action in which all the parties are Muslims. Thus, the contentions that the wife could submit to the jurisdiction of the Syariah Court and have recourse to s 53 of the 1993 Act are not quite correct as the 1993 Act limits its jurisdiction to Muslims only. The wife, being a non-Muslim, has no locus in the Syariah Court.

[23] Both civil and Syariah Courts are creatures of statutes such as the FC, the Acts of Parliament and the State Enactments. These two courts are administered separately and they are independent of each other. Although the Syariah Courts are state courts they are not lower in status than the civil courts. I would say, they are of equal standing under the FC. This recognition of the Syariah Courts was largely due to art 121(1A) of the FC which excludes the jurisdiction of the civil courts on any matter within the jurisdiction of the Syariah Courts. The Article, which came into force from 10 June 1988, states:

> The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

[24] In *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib* [1992] 2 MLJ 793, the Supreme Court ruled that art 121(1A) of the FC makes clear distinction between the jurisdiction of the Syariah and the civil courts by holding that:

> (1) The intention of Parliament by Article 121 (1A) of the Federal Constitution is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court.

Therefore, with the separation of the jurisdictions, the respective court cannot interfere with each other's jurisdiction. In *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara, Malaysia & Anor* [1999] 2 MLJ 241 the Federal Court reminded at p 245:

> We agree with the views expressed by the Court of Appeal on the necessity of cl (1A) being introduced into art 121 of the Federal Constitution. It was to stop the practice of aggrieved parties coming to the High Court to get the High Court to review decisions made by Syariah Courts. Decisions of Syariah Court should

rightly be reviewed by their own appellate courts. They have their own court procedure where decisions of a court of a Kathi or Kathi Besar are appealable to their Court of Appeal.

See also *Nedunchelian V Uthiradam v Norshafiqah Mah Singai Annal & Ors* [2005] 2 CLJ 306 where I agree with Syed Ahmad Helmy JC (as he then was) when he said at p 315:

> Cases authorities have repeatedly stressed and established that the High Court in its civil jurisdiction cannot challenge and or dispute and/or vary, strike out or declare or injunct the execution of an order of the Syariah Court — see *Sukma Darmawan Sasmitaat Madja lwn. Ketua Pengarah Penjara Malaysia* [1999] 1 CLJ 481; *Kamariah bte Ali v Kerajaan Negeri Kelantan, Malaysia dan Yang Lain (dan 3 Rayuan Yang Lain)* ; [2002] 3 CLJ 766.

Thus, the civil court cannot be moved to injunct a validly obtained order of a Syariah Court of competent jurisdiction. The injunction obtained by the wife, although addressed to the husband, was in effect a stay of proceedings of the husband's applications in the Syariah High Court and this amounts to an interference by the High Court of the husband's exercise of his right as a Muslim to pursue his remedies in the Syariah High Court. Obviously, the law does not permit such an interference.

CONVERSION

[25] The wife complained that the husband had no right to convert either child of the marriage to Islam without the consent of the wife. She said the choice of religion is a right vested in both parents by virtues of arts 12(4) and 8 of the FC and s 5 of the Guardianship of Infants Act 1961.

[26] After a careful study of the authorities, I am of the opinion that the complaint is misconceived. Either husband or wife has the right to convert a child of the marriage to Islam. The word 'parent' in art 12(4) of the FC, which states that the religion of a person under the age of 18 years shall be decided by his parent or guardian, means a single parent. In *Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300, Abdul Hamid Omar LP, delivering the judgment of the Supreme Court, said at p 302:

> In all the circumstances, we are of the view that in the wider interests of the nation, no infant shall have the automatic right to receive instructions relating to any other religion than his own without the permission of the *parent* or guardian.

Further down, His Lordship continued:

> We would observe that the appellant (*the father*) would have been entitled to the declaration he had asked for. However, we decline to make such declaration as the subject is no longer an infant.
>
> (Emphasis added.)

Therefore, art 12(4) must not be read as entrenching the right to choice of religion in both parents. That being so, art 8 is not violated as the right for the parent to convert the child to Islam applies in a situation where the converting spouse is the wife as in *Nedunchelian* and as such, the argument that both parents are vested with the equal right to choose is misplaced. Hence the conversion of the elder son to Islam by the husband albeit under the Selangor Enactment did not violate the FC. Also reliance cannot be placed on s 5 of the Guardianship of Infants Act 1961 which provides for equality of parental rights since s 1(3) of the same Act has prohibited the application of the Act to such person like the husband who is now a Muslim (see *Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah & Anor* [2004] 2 MLJ 241).

ERINFORD INJUNCTION

[27] There were two appeals in respect of Erinford injunction: one was against the order of setting aside by a majority decision of the Court of Appeal and the other was against the order of granting the same by a majority decision of the Court of Appeal pending the wife's application for leave to appeal to the Federal Court.

[28] The learned judicial commissioner in granting the Erinford injunction was of the view that on the balance of convenience it was desirable that the status quo of the parties be maintained pending appeal to the Court of Appeal to prevent the appeal from being rendered nugatory. In my judgment, the High Court was right. The High Court was entitled to grant an Erinford injunction even though it had held that it had no jurisdiction to grant the substantive interim injunction. In *Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448 Megarry J said at p 454:

> … where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges.

A A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal …

B So, in the light of the above, it is clear that even an objection is raised as to the jurisdiction of the Court this does not deprive the Court of its jurisdiction to preserve the status quo pending the appeal (see *Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan* [1986] 2 MLJ 39).

C See also *Celcom (Malaysia) Bhd v Inmiss Communication Sdn Bhd* [2003] 3 MLJ 178 where the above principle was applied in granting an Erinford injunction to restrain the defendant from taking further steps in a winding up petition pending hearing of the plaintiff's appeal to the Court of Appeal against the decision made by the High Court dismissing the plaintiff's
D application for an injunction to restrain the defendant from filing a winding up petition against the plaintiff.

Hence, the majority decision of the Court of Appeal setting aside the Erinford injunction was erroneous and to that extent the appeal must be
E allowed. The order of the Court of Appeal is therefore set aside and the order of the High Court granting the Erinford injunction is restored.

[29] With regard to the granting of the Erinford injunction pending the wife's application for leave to appeal to the Federal Court, I agree with the
F majority decision of the Court of Appeal that it had the jurisdiction to grant the wife's application. The issue concerning the jurisdictional point had been conclusively determined against the husband by the majority decision of the Court of Appeal in *Chong Wooi Leong & Ors v Lebbey Sdn Bhd (No 2)* [1998] 2 MLJ 661 where Abu Mansor JCA (later FCJ) considered it 'trite law that
G a court which has given judgment certainly has the power to order stay'. An Erinford injunction pending an appeal or an application for leave to appeal, like a stay of execution pending an appeal, is ordinarily granted by the court which made the decision that is the subject of the appeal. Certainly, the Court of Appeal has the jurisdiction to grant such an injunction pending an
H application for leave to appeal to the Federal Court. Thus, the majority decision of the Court of Appeal on 30 March 2007 applied the correct principles of law when it allowed the Erinford injunction pending the hearing and disposal of the wife's application for leave to appeal to the Federal Court.

I **[30]** The Federal Court too has the jurisdiction under s 80(1) of the Courts of Judicature Act 1964 to grant an Erinford injunction pending an application for leave to appeal to the Federal Court.

[31] Accordingly, my answers to the main questions posed are as follows: **A**

(1) Yes.

(2.1) Yes, but subject to the right of the converted spouse under the Islamic law.

(2.2.1) Yes.

(2.2.2) Yes. **B**

(2.3) No.

(2.4) No.

(2.5.1) Yes. **C**

(2.5.2) No.

(2.6.1) Yes — Filing the proceedings in the Syariah Court is not an abuse of process.

(2.6.2) Yes — unilateral conversion of a minor child of the Law Reform Marriage by the converted spouse is not an abuse of process. **D**

(2.7) No.

[32] With regard to the questions on Erinford injunction my answers to the questions posed are as follows: **E**

(1) No.

(2) Concurrent jurisdiction exercisable by the Court of Appeal.

CONCLUSION **F**

In the circumstances, I make the following orders:

(i) The wife's appeal in the Federal Court Civil Appeal No 02–19–2007(W) (the dismissal of the inter partes injunction) is dismissed with costs here and below and the deposit be paid to the husband to account of his taxed costs. The majority decision of the Court of Appeal Civil Appeal No W-02–955–2006 is upheld. **G**

(ii) The wife's appeal in the Federal Court Civil Appeal No 02–21–2007(W) (the setting aside of the Erinford injunction) is allowed with costs here and below and the deposit be returned to the wife. The majority decision of the Court of Appeal No W-02–955–2006 is reversed. **H**

(iii) The husband's appeal in the Federal Court Civil Appeal No 02–20–2007(W) (the granting of the Erinford injunction pending appeal to the Federal Court) is dismissed with costs here and below and the deposit be paid to the wife to account of her taxed costs. The majority decision of the Court of Appeal Civil Appeal No W-02–1041–2006 is upheld. **I**

Abdul Aziz Mohamad FCJ:

THE FACTS

[33] The parties will be referred to respectively as the wife and the husband. They were married on 26 July 2001, the marriage being solemnized and registered under the Law Reform (Marriage and Divorce) Act 1976 (Act 164) ('the Law Reform Act'). Being Hindu, they went through a Hindu wedding ceremony on 9 March 2002.

[34] It was and still is, to employ the term used in s 46(2) of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) ('the Family Law Act'), a 'non-Muslim marriage' governed by the Law Reform Act, which, according to its s 3(3), does not apply to a Muslim or to any person who is married under Islamic law and under which, according to that section, no marriage where one of the parties is a Muslim may be solemnized or registered. But that section provides for an exception which relates to s 51, whose subsections (1) and (2) provide as follows:

> (1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce:
>
> Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion.
>
> (2) The Court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and may attach any conditions to the decree of the dissolution as it thinks fit.

For the States of Malaya, the 'Court' in sub-s (2) is the High Court in Malaya that is mentioned in art 121(1)(a) of the Federal Constitution ('the Constitution'). The aforesaid exception provided by s 3(3) of the Law Reform Act is that a decree of divorce granted on a petition under s 51 'shall, notwithstanding any other written law to the contrary, be valid against the party who has … converted to Islam'.

[35] Two male children were born of the marriage: Dharvin Joshua on 11 May 2003 and Sharvind on 16 June 2005.

[36] Until the marriage broke down, the parties and their children had been living at a three-room apartment in the name of the husband and his

mother in Taman Miharja in the Federal Territory of Kuala Lumpur, where also lived the husband's mother, his two sisters and his niece ('the marital home'). A

[37] The husband's account of events relating to the breakdown of the marriage conflicts with that of the wife. The wife's account is essentially this. Since about October 2005 the Husband had kept staying away from the marital home for long periods. She believed he had a girlfriend. After leaving in February 2006 he did not show up until 11 May 2006, Dharvin's third birthday, when he verbally attacked her with the accusation that Sharvind was another man's son and threatened to kill her if she did not leave the marital home. He also told her that he had converted to Islam. His mother and sisters joined him in the verbal attack. She ended up attempting to commit suicide by slitting her wrist and swallowing fifty pills. Her female cousin, a birthday guest, took her to the Kuala Lumpur Hospital where she was warded for about four days. Upon her discharge, her aunt and uncle took her back to the marital home from the hospital. The husband and Dharvin were not there. The husband's mother told her that she had nothing more to do with Dharvin and asked her to leave the marital home. So, feeling scared, she took Sharvind, packed some of her things and left with Sharvind and her things for her grandmother's house in Seremban. B C D E

[38] The husband's account is essentially this. He denies staying away from the marital home. He denies the wife's account of what happened on 11 May 2006. He denies the wife's account of her coming back to the marital home from the hospital and taking away Sharvind. His account is that on 14 May 2006 at about 10pm he had a quarrel with the wife, after which he left the marital home. In his absence, the wife left the marital home without the children. On 16 May 2006 at about 11pm she came back with three unknown men to the marital home, when the husband was not there, and attempted to take away the two children, but she only managed to take away Sharvind because Dharvin refused to follow her. F G

[39] On 17 May 2006 the husband made a statutory declaration that he wished Dharvin to embrace Islam and that Dharvin's name be changed to Mohd Shazrul. In it the husband said that he and Dharvin were living at the marital home. It was intended for the Muslim Welfare Organisation Malaysia or Pertubuhan Kebajikan Islam Malaysia (PERKIM), which on 18 May 2006 certified that on that day the husband and Dharvin had embraced Islam at the PERKIM Headquarters at Jalan Ipoh, Kuala Lumpur, taking the names respectively of Muhammad Shafi Saravanan bin Abdullah and Muhammad Shazrul Dharvin bin Muhammad Shafi. The two certificates, one in respect of each of them, gave as their address the Rivera Apartments, Taman Muda, H I

Ampang, in the State of Selangor and directed them to the Jabatan Agama Islam of that State (JAIS) to obtain the 'kad pengislaman JAIS'.

[40] On 19 May 2006 the husband applied to the Syariah Subordinate Court, Federal Territory of Kuala Lumpur, for confirmation that the marriage of himself and the wife, which is a non-Muslim marriage, had been dissolved and for any reliefs that the court might consider fit. The notice of application was directed to the wife, who was cited as respondent, at an address in Seremban. The ground of the application, as stated in the husband's affidavit, was the husband's conversion to Islam on 18 May 2006. In the affidavit the husband gave the marital home as his address.

[41] The application was made on the basis of s 46(2) of the Family Law Act. According to its long title, it is an Act 'to enact certain provisions of the Islamic Family Law in respect of marriage, divorce, maintenance, guardianship, and other matters connected with family life'. Section 46 provides as follows:

> 46. (1) The renunciation of Islam by either party to a marriage or his or her conversion to a faith other than Islam shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court.
>
> (2) The conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court.

'Court' in the section is a Syariah Court. Subsection (1) involves a Syariah Court confirming that the apostasy of a party to a Muslim marriage has operated to dissolve the Muslim marriage. Subsection (2), on which the husband's application was based, involves a Syariah Court confirming that the conversion to Islam of a party to a non-Muslim marriage has operated to dissolve the non-Muslim marriage.

[42] Also on 19 May 2005 the husband applied to the Syariah High Court, Federal Territory of Kuala Lumpur, for interim custody of Dharvin. This was granted ex parte on 23 May 2006, the order to be in force until the disposal of the main custody application, the summons for which was dated the same day and was directed to the wife in Seremban, who was cited as respondent. The application was for the custody of Dharvin and appropriate reliefs and was made on the ground that as the husband and Dharvin were now Muslim, whereas the wife was Hindu, the husband was qualified to have custody, and the wife was not, according to Islamic law.

[43] The conversion to Islam of the husband and Dharvin was registered by the Registrar of Muallafs, State of Selangor, under section 111 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 (No 1 of 2003) ('the Selangor Enactment'). On 25 May 2006 he issued in respect of each of them a card which states that it was issued as a Certificate of Conversion (which section 112 requires to be issued to every registered convert). It states 18 June 2006 as the date of conversion.

[44] On 14 July 2006 the Syariah High Court, Federal Territory of Kuala Lumpur, issued a notification, directed to the wife in Seremban, of the husband's application for the custody of Dharvin and of its being set down for hearing on 14 August 2006. In the notification the husband and Dharvin were referred to by their original as well as their Muslim names.

AT THE HIGH COURT

[45] On 4 August 2006 the wife presented at the High Court in Malaya at Kuala Lumpur a petition for divorce under s 51 of the Law Reform Act on the ground of the husband's conversion to Islam. Besides other reliefs, she sought custody of Dharvin and Sharvind and a permanent (or perpetual) injunction to restrain the husband from changing the children's religion to Islam without her written consent. She also sought maintenance for herself and the children and a share in the marital home. On 7 August 2006 the wife filed a summons-in-chambers under the divorce petition at the High Court in Malaya at Kuala Lumpur, which was supported by an affidavit dated 4 August 2006 and by which she applied under O 29 of the Rules of the High Court 1980 for an interim (or temporary) injunction to restrain the husband, pending the disposal of her petition, from, firstly, converting Dharvin and Sharvind to Islam ('injunction against conversion') and, secondly, commencing and continuing with any form of proceedings in any Syariah Court in respect of the marriage of the parties or in respect of the two children or either of them ('injunction against proceedings').

[46] It is from the affidavits of the parties for that summons-in-chambers that have been gathered the facts that have been set out relating to the breakdown of the marriage, the conversion of the husband and Dharvin, and the husband's applications to the Syariah Courts. It must, however, be mentioned that, according to the wife, when she presented her petition for divorce and made the affidavit dated 4 August 2006 in support of her summons-in-chambers, she did not know of the actual fact of the husband's and Dharvin's conversion or of the husband's applications to the Syariah Courts. These she knew only from the husband's affidavit in reply. Until then, all the information that she had had was from the Syariah High Court's notification to her dated 14 July 2006 of the husband's custody application,

which she, in paragraph 12 of her said affidavit dated 4 August 2006, admitted receiving 'recently', and from which, according to her, she learned that the husband was seeking custody of Dharvin from the Syariah High Court and that Dharvin had been given a Muslim name, which was without her consent. The husband, however, claimed, in paragraph 14 of his affidavit in reply dated 28 August 2006, that the wife was aware of those things because he did attempt to serve on her the Syariah High Court's interim order for custody of Dharvin of 23 May 2006 and the husband's application to the Syariah Subordinate Court dated 19 May 2006 for confirmation of dissolution of marriage, but the wife refused to accept those documents after reading their contents. This the wife denied. Where the husband's conversion is concerned, it is a fact that the wife's petition for divorce, and her affidavit in support of her summons-in-chambers, do not disclose any knowledge of it other than what she claimed the husband told her on 11 May 2006, Dharvin's third birthday. Paragraph 6 of the petition for divorce avers that the husband moved out of the marital home in February 2006 and on 11 May 2006 told the wife that he had converted to Islam and threatened to kill her if she did not leave the marital home. The paragraph concludes by expressing the wife's belief that the husband had converted to Islam in February 2006 or earlier. The question of the date of conversion is important for the proviso to s 51(1) of the Law Reform Act, which is one of the questions that will be considered later.

[47] On 11 August 2006 the High Court granted ex parte the interim injunction sought by the wife. On 25 August 2006 the husband filed an application to set aside the ex parte injunction on several grounds, of which only two need be mentioned. One was that s 54(b) of the Specific Relief Act 1950 (Act 137) forbids the granting of an injunction 'to stay proceedings in a court not subordinate to that from which the injunction is sought'. The other was that the matters of dissolution of the marriage and custody of the children, and matters in respect of the marriage, were matters within the jurisdiction of the Syariah Courts and therefore, by virtue of cl (1A) of art 121 of the Constitution, the courts referred to in cl (1), which include the High Court in Malaya, do not have jurisdiction in respect of them. Clause (1A) says: 'The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts'.

[48] The hearing of the husband's setting-aside application and the inter partes hearing of the wife's injunction application were undertaken together. On 25 September 2006 the High Court dismissed the wife's injunction application and set aside the ex parte injunction of 11 August 2006. But on the oral application of the wife the High Court granted her on that day an Erinford injunction pending the wife's appeal to the Court of Appeal, in

substantially the same terms, except that the injunction against conversion was confined to Sharvind only. This was because at the inter partes hearing in the High Court the wife was concerned only to prevent the conversion of Sharvind, Dharvin having been certified to have converted, although she still disputed the validity of the conversion and was taking it up for judicial review.

[49] It is noted that while the injunction against proceedings sought to avoid proceedings in any Syariah Court in respect of the marriage or the two children or any of them, the immediate concern that is shown in the affidavit in support of the wife's summons-in-chambers was not a concern for the wife herself but a concern for Dharvin and for Dharvin only. And the immediate concern was in the matter of Dharvin's custody, which the husband was seeking in the Syariah High Court. There was no immediate concern as regards Sharvind, probably because the husband was not seeking the custody of him and he was in the actual custody of the wife. The cause of the wife's concern was of a jurisdictional nature, as may be seen from the grounds of the application that are set out in the summons-in-chambers, where the references are to the "child", and from paragraph 13 of the wife's supporting affidavit dated 4 August 2006. From these it may be seen that the wife's case for an injunction was premised on the contention that the Syariah Courts have no jurisdiction where one party to a dispute is not a Muslim and because of that the wife would not be entitled to appear before the Syariah High Court to be heard against the husband's application for custody and a decision would be made by the Syariah High Court that the wife feared would not be in the best interests of the child. To the wife, therefore, the husband's attempt to obtain an order for custody of the child Dharvin from the Syariah High Court would be an abuse of the process of the Syariah High Court. That approach to jurisdiction that the wife adopted in her injunction application, which Aziah Ali JC (now J) in the High Court called 'the remedy approach', is founded on the declaration in List II (State List) of the Ninth Schedule to the Constitution ('List II') that Syariah Courts 'shall have jurisdiction only over persons professing the religion of Islam', consistently with which paragraph (b) of s 46(2) of the Administration Act provides, in respect of the civil jurisdiction, that the actions and proceedings that a Syariah High Court shall hear are 'actions and proceedings in which all the parties are Muslims'. On the other hand, the approach taken by the husband in one of the grounds of his application to set aside the ex parte injunction and in opposing the grant inter partes of the injunction was that the matters in dispute between the parties were matters within the jurisdiction of the Syariah Courts. The result of that is that by virtue of Clause (1A) of Article 121 of the Constitution, the High Court in placeMalaya 'shall have no jurisdiction' in respect of those matters, notwithstanding s 51 of the Law Reform Act. It was therefore inevitable, and needful, that, in the hearing inter

partes of the wife's injunction application and in the hearing of the husband's striking-out application, the question of jurisdiction be argued and decided.

[50] In paragraph 19 of her grounds of judgment, Aziah Ali JC said: '[The husband's counsel] submits that in determining whether this court or the Syariah Court has jurisdiction, the subject matter approach should be adopted as opposed to the remedy approach submitted by counsel for the [Wife]'. It would appear from that that in the High Court the approaches to jurisdiction adopted by the husband and the wife were respectively termed 'the subject matter approach' and 'the remedy approach'. Aziah Ali JC decided in favour of the subject-matter approach and found, in paragraph 21 of her grounds of judgment, that 'the subject matters of the [Wife's] application are matters that are expressly provided for in the laws conferring jurisdiction on the Syariah Court thereby excluding the jurisdiction of this court'. She also found that the interim injunction sought by the wife (and the ex parte interim injunction already granted) was in effect a stay of proceedings in the Syariah Court which was disallowed by s 54(b) of the Specific Relief Act 1950.

AT THE COURT OF APPEAL

[51] From the High Court's substantive decision the wife appealed to the Court of Appeal. From the High Court's Erinford order the husband appealed to the Court of Appeal. On 13 March 2007 the Court of Appeal (Gopal Sri Ram, Suriyadi and Hasan Lah JJCA), by a majority (Gopal Sri Ram JCA dissenting), dismissed the wife's appeal and allowed the husband's appeal.

[52] Suriyadi JCA decided in favour of dismissing the wife's appeal because he found that she had failed to show a serious question to be tried in support of her injunction application. The finding was made after considering the prayers. As to the prayer to restrain conversion, the learned judge saw the fear of conversion on the wife's part as being confined to Sharvind only, Dharvin having been converted, but he considered that Sharvind's conversion was unlikely because the husband had no interest in him. As to the prayer to restrain proceedings in the Syariah Courts, the learned judge opined that, as regards commencing of proceedings, it could not be restrained because proceedings had already commenced. As regards restraining the continuance of proceedings, the learned judge considered the proceedings as being of dissolution of marriage and custody. As regards dissolution of marriage, the learned judge said that according to Islamic law the marriage of the parties had ended upon the husband's conversion and that what remained was the purely administrative act of making a formal declaration of dissolution of marriage under s 46(2) of the Family Law Act. Since the wife also wanted the

marriage to be dissolved, the learned judge considered that the wife's objection to the husband's resort to the Syariah Subordinate Court on the ground that it had no jurisdiction — as to which he was not making a ruling — made no sense and was a flimsy ground and to grant an injunction based on that ground would be an abuse of the process of the court. As regards custody, it would appear that the learned judge considered it in two aspects. In the first place, as regards Dharvin, he noted that the Syariah High Court had already made an interim custody order on 23 May 2006 and 'it is not for this court to challenge or injunct its execution', and, as regards Sharvind, he said 'the substratum was a non-starter due to the earlier supplied reason', which seems to mean in effect that there was no basis for the injunction because the husband was not interested in Sharvind. In the second place, by indicating his view that although the injunction sought by the wife was directed against the husband 'the eventual effect was to shackle the Syariah Court', the learned judge seems to have intended to say that that was not allowed, although he did not expressly say so or mention s 54(b) of the Specific Relief Act 1950. From those matters arose the conclusion that the wife had not established a serious question to be tried.

[53] Hasan Lah JCA would dismiss the wife's appeal solely on two grounds. One was that the wife's petition for divorce was premature and invalid in view of the proviso to s 51(1) of the Law Reform Act, with the consequence that the wife's summons-in-chambers filed in the petition was also invalid. The other was that Aziah Ali JC was right about the application of s 54(b) of the Specific Relief Act 1950.

[54] Gopal Sri Ram JCA would allow the wife's appeal. As to the petition for divorce being premature under the proviso to s 51(1) of the Law Reform Act, the learned judge held that the question of the date of the husband's conversion to Islam must be tried because the date 'is seriously contested by the wife' and the evidence on it 'is in serious conflict'. As to the question of s 54(b) of the Specific Relief Act 1950, the learned judge held that it does not apply to temporary injunctions and, even if it does, 'what it prohibits are injunctions directed against a court and not against an individual', but the injunction that the wife sought was directed at the husband, not at the Syariah Court, so that the section does not apply on the facts of this case.

[55] Gopal Sri Ram JCA decided the jurisdiction issue, which was not decided by the majority, in favour of the wife, concluding that Aziah Ali JCA 'was … in error when she declined jurisdiction over the interlocutory summons for an injunction'. I shall not attempt to give a summary of the reasons for his decision because I feel quite incapable of giving one that sets

out the line of thinking in a manner that is capable of being appreciated and followed and at the same time accurately.

THE PRESENT APPEALS

[56] The dismissal by the Court of Appeal of the wife's appeal has given rise to appeal No 19, the wife's appeal, which is the substantive appeal.

[57] The husband's Erinford appeal was allowed by the majority. It would appear that it was allowed as a matter of necessity following upon, and as a natural consequence of, the dismissal of the wife's appeal. Gopal Sri Ram JCA would dismiss the husband's appeal for the same reasons as he would allow the wife's appeal. The Court of Appeal's allowance of the husband's Erinford appeal has given rise to appeal No 21, the wife's appeal.

[58] On an application by the wife, the same panel of the Court of Appeal, by a majority, Suriyadi Halim Omar JCA dissenting, granted an Erinford injunction on the same terms as those granted by the High Court, pending disposal of the wife's application for leave to appeal to this court. This has given rise to appeal No 20, the husband's appeal. When granting the wife leave to appeal in respect of her substantive appeal, this court granted an injunction on the same terms pending disposal of the appeal.

THE QUESTION OF PREMATURITY

[59] In the substantive appeal, which will be dealt with first, it is appropriate that the question of prematurity of the wife's petition for divorce be disposed of first because the husband's success on the question will impact on the petition and on the wife's injunction application which is dependent on the petition. It is a question that the husband did not raise in the High Court and for which no question was framed when leave to appeal to this court was granted. It arises from the proviso to s 51(1) of the Law Reform Act which prohibits the presentation of a petition under s 51 'before the expiration of the period of three months from the date of the conversion'. The petition in this case was presented on 4 August 2006. It would escape the prohibition only if the husband converted to Islam on 4 May 2006 or earlier.

[60] At this juncture it is appropriate to set out some relevant statutory provisions relating to conversion in the Federal Territory of Kuala Lumpur, where the conversion took place, and in the State of Selangor, where the registration of the conversion took place. The provisions are in ss 85 to 95 of the Administration Act and ss 107–117 of the Selangor Enactment. As they are virtually identical, references will, for convenience, be made only to the Selangor Enactment. According to s 107, the only requirements for a valid

conversion to Islam are the uttering by the person concerned, in reasonably intelligible Arabic, of his own free will, of the two clauses of the Affirmation of Faith, with awareness of their meaning. No witnesses or documentation are necessary for a valid conversion, although witnesses would certainly be useful in case the fact of conversion is disputed. Upon uttering the Affirmation of Faith according to s 107, the person, says s 108, becomes a Muslim. Section 111 provides for the registration of converts (muallafs) by the Registrar of Muallafs, on their application. Registration is not compulsory. All that the Registrar does is satisfy himself of the fact and date of conversion and enter these in the Register of Muallafs. He is not normally involved in the act of conversion, which would have taken place earlier and elsewhere. It is only if he is not satisfied that the person concerned has complied with s 107 that, by s 111(5), he may permit the person to do the act of conversion in his presence or the presence of any of his officers by uttering the Affirmation of Faith in accordance with section 107. Section 112 requires the Registrar to issue a Certificate of Conversion upon registration of a conversion.

[61] I am unable to agree with the wife's submission that even if the proviso operates on the petition, it operates only to disqualify the prayer for dissolution of the marriage but not the prayers for custody, maintenance and a share of the marital home, which the wife, therefore, could still proceed with. According to sub-s (2) of s 51, those reliefs can only be granted upon dissolution of the marriage. They cannot be granted independently of the dissolution of the marriage.

[62] I am unable to agree with the wife's reliance on r 102 of the Divorce and Matrimonial proceedings Rules 1980 made under the Law Reform Act in the event that the petition is held to be caught by the proviso to s 51(1). Rule 102 provides escapes from the voiding of proceedings for non-compliance with 'these rules or any rule or practice'. It does not concern non-compliance with the Act itself, much less with non-compliance with the proviso to s 51(1), which lays down a condition in strict prohibitory terms for the presentation of a petition under s 51. The wife argues that the word 'shall' in the proviso is only directory, not mandatory, because the proviso deals with a matter of procedure, rather than substantive law, in that it is s 51(1) that gives the right to petition, not the proviso. I am unable to agree. The proviso is part of s 51(1). The right to petition is subjected to the proviso. The proviso governs that right. The word 'shall' is part of the clause 'no petition under this section shall be presented', which is of a prohibitory nature.

[63] As to the date of the husband's conversion to Islam, Gopal Sri Ram JCA, as I have said, said that it was seriously contested by the wife and that the evidence on it was in serious conflict. A scrutiny of the pleadings, however, does not bear that out. As far as affidavits are concerned, the wife,

in her affidavit dated 4 August 2006 in support of her injunction application, did not make any averment as to the date of the husband's conversion. The matter of the husband's conversion she mentioned only in paragraph 7 of that affidavit, where she said, among other things, that when the husband turned up at the marital home on Dharvin's third birthday on 11 May 2006, he informed her that he had converted to Islam. But she made no averment as to the date of conversion, either as informed to her by the husband or as she believed it to be. It must be remembered that even if the husband did inform the wife on 11 May 2006 that he had converted to Islam and he did convert to Islam on 11 May or a few days earlier, the petition would still be caught by the proviso to s 51(1). The husband in his affidavit dated 28 August 2006 denied, in paragraph 9, the wife's averments in her paragraph 7 as to what happened on 11 May 2006 and instead gave his own version of what happened, and it was as to what happened on 14 May 2006, which has been briefly related earlier. More importantly, in paragraph 5 of that affidavit the husband positively averred that he and Dharvin had converted to Islam on 18 May 2006 and exhibited the Certificates of Conversion (in card form) issued by the Registrar of Muallafs of the State of Selangor that I have referred to. He also exhibited, against his paragraph 18, PERKIM's certificates of conversion that I have referred to, which stated that the husband and Dharvin had embraced Islam on 18 May 2006. The wife did respond to the husband's affidavit by an affidavit dated 29 August 2006, but nowhere in that affidavit did the wife, in face of those documents, contend that the husband had converted even earlier than 18 May 2006 or indicate that she doubted the genuineness of the documents or the correctness of their contents. On the contrary, by the general tenor of her affidavit she does not seem to question that the husband converted on 18 May 2006. For example, in her paragraph 6 she said: 'Until I read the [Husband's] affidavit under reply, I did not know at all of the conversion of the [Husband], of the purported conversion of Dharvin … ', and in her paragraph 7 she said: 'I aver that the [Husband] did not at any time ask me to convert to Islam, and did not at any time invite me to continue as his wife after his conversion'. The references to the husband's conversion in those two sentences have to be read as references to his conversion as revealed by him in his affidavit, that is conversion on 18 May 2006. In her paragraph 3 the wife did dispute Dharvin's conversion, but only as to its legality and not as to the fact of conversion on 18 May 2006.

[64] As far as the affidavits are concerned, therefore, there is no contest by the wife of the date of conversion 18 May 2006 and there is no conflict of evidence on the date of conversion. In this connection I may mention that in paragraph 2.5 of the wife's Outline Submission in Reply there appears this statement: 'Counsel for the [Husband] concedes that an issue of fact as to the exact date of the conversion has arisen by reason of the conflicting positions

taken in the affidavits'. I have not been able to find from the records confirmation of the husband's counsel making such a concession.

[65] It was only in her petition, which was earlier than the affidavits, that the wife made an averment as to the date of conversion. If the wife is to be believed, that averment was made before she became aware of the documents evidencing conversion on 18 May 2006. It is in paragraph 6, in Malay which may be translated as follows:

> The [Husband] in or about October 2006 started to leave the marital home and he moved out since February 2006. On 11 May 2006 the [Husband] informed the [Wife] that he had changed his religion to Islam and threatened to kill the [Wife] if she did not leave the said marital home. Accordingly [Justeru itu], the [Wife] believes that the [Husband] had changed his religion to Islam in February 2006 or earlier.

[66] The wife's date for the husband's conversion was February 2006 or earlier, which would be more than three months before she presented her petition for divorce. But it was a date born of her own belief, a conjecture that was based solely on the alleged fact that February 2006 was the last time the husband left the marital home before he announced to her that he had converted to Islam. Even if he did make the announcement on 11 May 2006, which he was to deny in his injunction affidavit, it would not necessarily follow that the conversion was in February 2006. It could equally have been just on 11 May 2006 itself or a few days earlier. The wife's choice of February 2006 as the believed date of conversion might appear to be a choice of convenience to provide an escape from the proviso to s 51(1).

[67] Like Gopal Sri Ram JCA in the Court of Appeal, the wife in this court also takes the stand that the evidence as to the date of the husband's conversion is in conflict. In paragraph 4.1 of her Outline Submission in Reply she refers to 'the conflicting versions presented by the husband and wife as to when the conversion occurred'. As has been seen, as far as the affidavits are concerned, there is no conflict. As for the petition for divorce, there has not been disclosed to us any reply by the husband to it. Probably there has not been any reply yet in view of the injunction proceedings. Therefore if the petition for divorce were to be brought into the question of conflict of versions, its conflict can only be with the husband's injunction affidavit, which presented positive evidence of the husband's conversion on 18 May 2006, which the wife, to judge by her affidavit in reply, as has been said, does not seem to dispute. So taking the petition for divorce into the balance, what we have is the wife's belief as to the February 2006 date with no firm foundation, followed by the husband's positive evidence of conversion on

18 May 2006, and followed by the wife's seeming acceptance of that evidence. The result is still that there appears to be no conflict.

[68] Moreover, from a reading of the wife's Outline Submission in Reply, it does not appear that the wife's case is that although the husband may have, or granted that he had, converted to Islam at PERKIM on 18 May 2006, there is a question to be tried whether even in February 2006 or earlier he had already converted to Islam. The husband's case in submission appears to be that any other date of conversion than 18 May 2006 is out of the question because, by s 112(2) of the Selangor Enactment, the Registrar of Muallafs' Certificate of Conversion 'shall be conclusive proof of the facts stated in the Certificate'. The wife, in her Outline Submission in Reply, advances reasons, which to me appear tenuous, for contending that despite the conclusiveness of the Registrar's Certificate, the correctness of the facts stated in it may still be rebutted. There is a suggestion in paragraph 4.3 of that Outline Submission that the Registrar's determination of the facts in the Certificate of Conversion upon inquiries under s 111 of the Selangor Enactment 'may have been conducted erroneously or been achieved through a contrivance on the part of the convert concerned'. The wife's case in submission, therefore, is to deny the date 18 May 2006, impliedly in favour of her date in February 2006 or earlier. On the husband's part, it does not appear that his contention is that the wife's belief as to the date of conversion being February 2006 or earlier is, in itself, devoid of merit for it to be a matter deserving to be tried in the petition. The husband's argument is that any other date of conversion is out of the question because of the conclusiveness of the Certificate of Conversion. From the way the submissions have gone, therefore, the matter of the date of conversion would appear to be one of choice between the two dates.

[69] There is nothing in the evidence to warrant even a suspicion that the PERKIM certificates were issued fraudulently, in that, for example, the husband and Dharvin did not convert at PERKIM Headquarters as stated in the certificates, or that the conversion was not on 18 May 2006, or that the husband, after knowing of the wife's petition dated 4 August 2006, in order to ensnare the wife in the proviso to s 51(1), contrived to have PERKIM and the Registrar of Muallafs create evidence that he had converted on 18 May 2006. The evidence must be taken at its face value as genuine and as good evidence of the conversion of the husband on 18 May 2006. So if it were a matter of choice between that date and the wife's date, which is a conjectural date with no firm grounds, the choice has to be in favour of the husband.

[70] Having said and considered all that, however, I am nevertheless left with a feeling of uneasiness about making a finding, in reliance on the reasons that I have indicated, that the date of the husband's conversion has to be 18 May 2006, with the damaging consequences that such a finding will have

at this stage on the wife's petition and injunction application. As far as affidavits are concerned, I bear in mind that they related to the wife's injunction application in which the issue of prematurity did not arise. As already stated, that issue did not arise in the High Court. At that stage the wife was not in danger of the proviso to s 51(1). I bear in mind that could be the reason why she was reticent about the date of conversion in not asserting it in her affidavit in support of the injunction application and in response to the evidence disclosed by the husband. There was probably nothing much that she could have done about the evidence disclosed by the husband, but had she been aware of the danger of the proviso she might have asserted something in reply in support of her date. As to its appearing from the submissions that the matter of the date of conversion is one of choice between the two dates, I cannot help feeling that it has come about because both sides, the husband in relying on the conclusiveness of the Certificate of Conversion and the wife in strenuously arguing against conclusiveness, might have thought that conclusiveness of the Certificate of Conversion means, or means also, exclusiveness, that is, that the certificate has the effect of throwing out of the question any other date of conversion. But what s 112(2) of the Selangor Enactment says is that the Certificate of Conversion 'shall be conclusive proof of the facts stated in the Certificate'. It means that the fact stated in it that the husband converted to Islam on 18 June 2006 cannot be disputed. But it does not mean that it cannot be shown that although on 18 June 2006 the husband converted to Islam, presumably in a formal ceremony at PERKIM in the presence of witnesses, he had even earlier converted to Islam by reciting the Affirmation of Faith in accordance with s 107.

[71] I therefore feel that, despite appearances from the submissions, this court ought not to decide the question of the date of conversion as a matter of choice between the two dates and that the wife ought to be given a chance in the trial of the petition to prove her belief that the husband had converted to Islam in February 2006 or earlier. That belief is founded on the alleged fact that the husband, on turning up at the marital home on 11 May 2006 after last leaving it in February 2006, informed the wife that he had converted to Islam. If indeed the husband did inform the wife on 11 May 2006 that he had converted to Islam, the question that will arise is whether the information was true, and if it was true, the question that will arise is when, whether on or before 11 May 2006, did he embrace Islam? It could have been any time before 11 May 2006, even in February 2006. Although I said that February 2006 might appear to have been chosen by the wife to escape from the proviso to s 51(1), I feel that she ought to be given a chance in the trial of her petition to prove that she was right or, failing that, to prove that the conversion that the husband allegedly announced on 11 May 2006 took place sometime on or before 4 May 2006.

A **[72]** For the wife, the alleged events on 11 May 2006 are important to the question of the date of conversion of the husband because they provided, in the husband's alleged announcement that he had converted to Islam, the basis for her conjecture that he had converted to Islam in February 2006. Although he denied the events of 11 May 2006, including his alleged announcement B of conversion, I have been struck by something in the affidavits that strengthens the need to inquire into the truth of the wife's allegations. As has been related, according to the wife the husband on 11 May 2006 informed her that he had converted to Islam and it was on 11 May 2006 that she attempted to commit suicide. In paragraph 8 of her affidavit dated 4 August C 2006 the wife said that on 12 May 2006 she was taken to hospital where she was warded for about four days. It is a fact that on 15 June 2006 at 9.20 p.m. she lodged a police report at the Cheras Police Station as to what she alleged happened on 11 May 2006. The husband, in paragraph 9 of his affidavit dated 26 August 2006, denied the wife's allegation as to what happened on D 11 May 2006, including his telling the wife that he had converted to Islam, and instead contended that the crisis occurred on 14 May 2006 when they had a quarrel and he left the marital home. But in paragraph 10 of that affidavit, in reply to the wife's paragraph 8, the husband did not deny the E wife's averment of being warded for four days from 12 May 2006 as a result of her attempted suicide. He admitted the attempted suicide, saying that it was by slitting her wrist and swallowing 50 pills of various kinds and that it was because the wife knew of his intention to convert to Islam. The question is, if the events of 11 May 2006, as alleged by the wife, did not take place, F when did the attempted suicide take place that resulted in the wife's being warded for four days? The husband did not state the date. It could not have been on 14 May 2006, the date of the husband's version of the crisis, because the wife was well enough to go to the Cheras Police Station next day to lodge her report.

G

[73] To conclude, in my judgment the question whether the husband had, even on or before 4 May 2006, already converted to Islam has to be tried. If he had, in the trial the question will also have to be decided, which was not argued in this court, which date is to be 'the date of the conversion' for the H purposes of the proviso to s 51(1), 18 May 2006 or the earlier date.

SECTION 54(b) SPECIFIC RELIEF ACT 1950

[74] I proceed now to deal with the question of s 54(b) of the Specific I Relief Act 1950. Section 54 sets out in paragraphs (a) to (k) the purposes for which, or the circumstances in which, an injunction cannot be granted. By paragraph (b), an injunction cannot be granted 'to stay proceedings in a court not subordinate to that from which the injunction is sought'. Two issues were considered in the Court of Appeal about s 54 and

paragraph (b). The first issue was whether s 54 applies to interim injunctions. The second was whether the injunction sought in this case, by its terms, would be caught by paragraph (b).

[75] On the first issue, which arose because the wife contended that s 54 does not apply to interim injunctions, Hasan Lah JCA relied on the decision of the Supreme Court in *Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia* [1988] 1 MLJ 302 as laying down that s 54 is also applicable to interlocutory injunctions. Gopal Sri Ram JCA, on the other hand, was of the view that the section applies only to perpetual or final injunctions and not to interim injunctions and relied on the Court of Appeal decision in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, which preferred not to follow Penang Han Chiang.

[76] On the second issue, as to which the wife's stand was that the injunction would not be caught by paragraph (b) because it was directed against the husband and not against the Syariah Courts, Hasan Lah JCA agreed with Aziah Ali JC that the injunction, though addressed to the husband, was in effect to stay proceedings on the husband's applications in the Syariah Courts because in effect it would restrain them from hearing the applications. Gopal Sri Ram JCA, on the other hand, held that paragraph (b) prohibits injunctions directed against a court, not against an individual, and therefore does not prohibit the injunction in this case, which was directed only against the husband.

[77] So that the authorities that will be considered in relation to the first issue will be more readily understood, it is necessary to reproduce in its entirety Part III of the Specific Relief Act 1950, but omitting the illustrations:

PART III

PREVENTIVE RELIEF

CHAPTER IX

OF INJUNCTIONS GENERALLY

Preventive relief how granted

Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

Temporary and perpetual injunctions

(1) Temporary injunctions are such as are to continue until a specified

time, or until the further order of the court. They may be granted at any period of a suit, and are regulated by the law relating to civil procedure.

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

CHAPTER X

OF PERPETUAL INJUNCTIONS

Perpetual injunctions when granted

(1) Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

(2) When such an obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that pecuniary compensation would not afford adequate relief;

(d) where it is probable that pecuniary compensation cannot be got for the invasion; and

(e) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Mandatory injunctions

53 When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court

may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

Injunction when refused

54 An injunction cannot be granted —

(a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such a restraint is necessary to prevent a multiplicity of proceedings;

(b) to stay proceedings in a court not subordinate to that from which the injunction is sought;

(c) to restrain persons from applying to any legislative body;

(d) to interfere with the public duties of any department of any Government in placeMalaysia, or with the sovereign acts of a foreign Government;

(e) to stay proceedings in any criminal matter;

(f) to prevent the breach of a contract the performance of which would not be specifically enforced;

(g) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(h) to prevent a continuing breach in which the applicant has acquiesced;

(i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust;

(j) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the court; or

(k) where the applicant has no personal interest in the matter.

Injunction to perform negative agreement

55 Notwithstanding paragraph 54(f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:

Provided that the applicant has not failed to perform the contract so far as it is binding on him.

[78] It will be seen that although ss 52–55 appear to belong to Chapter X headed 'OF PERPETUAL INJUNCTIONS', only s 52 mentions 'perpetual injunction'. The other sections, particularly the prohibitory s 54, use the general word 'injunction'.

[79] In *Vethanayagam v Karuppiah & Ors*. [1968] 1 MLJ 283, a High Court decision (Raja Azlan Shah J), the question was whether it was proper to grant an interim injunction (which was sought by motion) at the suit of a member of an unlawful society to restrain other members of that society from violating its rules. The question fell to be decided in relation to paragraph (f) of s 54 of the Specific Relief (Malay States) Ordinance 1950, of which the present Act is a revised version. The motion was dismissed. Relevant to the present discussion is the following passage at p 284C–D (left):

> An order for a temporary injunction can be sought only in aid of a prospective order for a perpetual injunction. If, therefore, in the event of the plaintiff's success, he cannot obtain a decree for perpetual injunction, it is not competent for him to ask for a temporary injunction (see *Bishun Prashad v Sashi Bhusan,* AIR 1923 Pat 133). In other words, a temporary injunction will not be granted in cases where a permanent injunction is not available under sections 52 to 54 of the Specific Relief (Malay States) Ordinance 1950.

It does not appear that the learned judge regarded s 54 as a section about perpetual and temporary injunctions. It would appear that the thinking was that, while the section applies only to perpetual injunctions, nonetheless where a permanent injunction is not available under the section, a temporary injunction will also not be available.

[80] In *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323, a High Court decision (Edgar Joseph Jr. J), the plaintiff sought an interlocutory injunction restraining the defendant municipality from demolishing her premises. The defendant raised the prohibition of paragraph (d) of s 54 by way of preliminary objection. The preliminary objection was dismissed on two grounds. It is the first ground that is relevant for the present discussion. It is in this passage at pg 324:

> In the first place, in my view, section 54 of the Specific Relief Act, 1950 applies only to applications for perpetual injunctions. It has no relevance to applications for a temporary injunction as in the instant case. This is clear from a reading of Chapters IX and X of the Act which are entitled 'of injunctions generally' and 'of perpetual injunctions' respectively. Section 54 (d) relied on by Mr Chandran falls under Chapter X which deals exclusively with perpetual injunctions. Next, section 51(1) which falls under Chapter IX states categorically that 'temporary injunctions may be granted for any period of a suit and are regulated by the law relating to civil procedure.' This, in my view, makes the Rules of the High Court

1980, applicable and there is nothing therein which constitutes a bar to the granting of an interim injunction against a municipality. I also notice that at p 909 of Pollock & Mulla on the Indian Contract & Specific Relief Acts, Eighth Edition, there appears the following short sentence in the commentary entitled 'Scope of the Section' on s 56 of the Indian Act which is generally *in pari materia* with s 54 of our Act: 'This section gives a list of cases in which a *perpetual* injunction cannot be granted. (Emphasis added.)

There are two aspects to that ground. One is that, in view of its title, Chapter X of Part III of the Act, which includes s 54, 'deals exclusively with perpetual injunctions'. I may add, in connection with this aspect, that Lort-Williams J in *Milton & Co v Ojha Automobile Engineering Co* AIR 1931 Cal. 279, said at p 280 that the corresponding s 56 of the Indian Specific Relief Act 1877, 'refers only to perpetual injunctions. Temporary injunctions are regulated by the Civil PC (O 39)'. The other aspect is the reliance on the fact that s 51(1) says that temporary injunctions 'are regulated by the law relating to civil procedure', and there is nothing in the Rules of the High Court 1980 to bar the granting of an interim injunction against a municipality. *Vethanayagam* was not referred to.

[81] In *Si Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd* [1985] 1 MLJ 132, there was an agreement between the appellant company and the respondent company under which the running of a hotel would fall on the respondent company. Following a dispute, the respondent company obtained an interim injunction to restrain the appellant company from interfering in the running of the hotel. The appellant company failed in their application to set aside the interim injunction and appealed to this court. Among the matters that arose in the appeal were two points of law that the judge did not deal with and the appellant's counsel urged this court to consider, one of which concerned paragraph (f) of s 54. *Vethanayagam* was cited by the appellant's counsel in submitting that if a permanent injunction cannot be granted, it follows that neither can an interim injunction. This court did not answer the point of law, saying, at p 135G–H (right): 'We do not … see the necessity at that stage for the learned Judge to decide on these difficult points of law'.

[82] In *Penang Han Chiang*, there was a dispute between the appellant and certain teachers in the former employment of the appellant, involving an allegation of breaches of service contracts. The dispute was referred to the Industrial Court, after which the respondent union, representing the teachers, filed a civil suit and obtained an interlocutory injunction. The Supreme Court, in a judgment which does not state the terms of the interlocutory injunction, found that the granting of the interlocutory injunction was not an exercise of judicial discretion, one of the reasons being, at p 303 H (left), that the learned judge 'seemed to have disregarded the

well-established rule … that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced (see se 54(f) …)'. It does not appear that the question whether s 54 applies also to temporary injunctions arose for decision and it would rather appear that it was simply assumed by the Supreme Court that s 54 applies both to perpetual and temporary injunctions.

[83] In *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533, the plaintiff company sought by originating summon an injunction, which the learned judge (VC George J) treated as a temporary injunction, to restrain the defendants from petitioning the court to wind up the plaintiff company for being unable to pay its debts. The defendants raised the preliminary objection that the inherent jurisdiction of the court to grant injunctions had been excluded by the statutory prohibition of s 54(b). The preliminary objection was overruled for two reasons. The first reason is in these words at pp 534I (right) to 535C (left):

> Section 50 of the Specific Relief Act provides statutory confirmation of the inherent jurisdiction of the court to grant preventive relief by means of injunction, temporary or perpetual. Sections 52 to 55 of the Act are found in the 10th Chapter thereof which chapter is entitled 'Perpetual Injunctions'. On the face of it, those four sections 52 to 55 must accordingly be read to have reference to perpetual injunctions only. Dato' Justice Edgar Joseph Jr in *Tan Suan Choo v Majlis Perbandaran, Pulau Pinang applied such a limitation to the reading of those sections*. Since the relief sought in the instant case is temporary and not perpetual although there appears to be some inconsistency between the title to the 10th Chapter and the language of those four sections, I have not been able to see my way to refuse to read those sections without imposing the limitations suggested by the title to the chapter.

Although he noticed 'some inconsistency', such as I have remarked upon, between the title of Chapter X and the language of its ss 52–55, the learned judge felt unable to do otherwise than follow *Tan Suan Choo* in reading the sections subject to 'the limitations suggested by the title to the chapte'. Vethanayagam was not referred to.

[84] The Court of Appeal in Keet Gerald Francis (above) ruled in favour of *Tan Suan Choo* and *Bina Satu* as against *Vethanayagam* and *Penang Han Chiang*. This may be seen in the following paragraphs at p 206:

> The correctness of the decision in *Vethanayagam* [1968] 1 MLJ 283 depends, in our judgment, upon the answer to one crucial question. It is this. Do the provisions of Ch X of Pt III of the Specific Relief Act 1950 (within which fall ss 52 to 55) apply to both interlocutory and perpetual injunctions? In *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323, Edgar Joseph Jr J answered that question in the negative. His Lordship in that case held that the statutory bar

encapsulated in s 54(d) of the Act is confined to perpetual or final injunctions and has no application to temporary injunctions which are governed by s 51 of the Act. He came to that conclusion by reference to the headings appearing in Pt III of the Act. The judicial reasoning in *Tan Suan Choo* is faultless and the interpretative process applied there has the support of respectable and high authority. Headings, unlike marginal notes, are permissible guides to the interpretation of statutes: Corporation of the City of *Toronto v Toronto Railway Co* [1907] AC 315. The decision in Tan Suan Choo was followed by VC George J in *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533. Although *Tan Suan Choo* and *Bina Satu* appear to be in conflict with the decision of the Supreme Court in *Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia* [1988] 1 MLJ 302, the approach adopted in both the former and the authorities supporting that approach were never considered by the Supreme Court in *Penang Han Chiang*. As such, we are not persuaded that the latter overruled both the former sub silentio, more so when neither were referred to in the judgment of the Supreme Court. We are of the view that the decision in *Penang Han Chiang* may well have been different if the attention of the Supreme Court had been drawn to the judgments in Tan Suan Choo and Bina Satu.

In our considered opinion, both *Tan Suan Choo* and *Bina Satu* correctly state the law. It therefore follows that *Vethanayagam*, in so far as it conflicts with these two authorities is bad law and should no longer be followed. We are fortified in the view that we have taken by the fact that the Federal Court in *Si Rusa* [1985] 1 MLJ 132 declined to follow and apply *Vethanayagam* and by the approach laid down in *Tien Ik* [1992] 2 MLJ 689.

[85] Really in the balance are *Tan Suan Choo* and *Bina Satu*, on the one hand, and *Vethanayagam*, on the other. I am quite satisfied to exclude *Penang Han Chiang* from the balance for the reason that I have indicated and those given by the Court of Appeal. One matter needs first to be straightened out about *Vethanayagam*. Contrary to what the Court of Appeal said, this court in *Si Rusa* did not decline to follow and apply *Vethanayagam*. As has been shown, this court merely did not enter upon a consideration of it..

[86] As I said, *Vethanayaagam* seems to have proceeded on the basis that s 54 speaks of perpetual injunctions only. To that extent there is no conflict between it, on the one hand, and *Tan Suan Choo* and *Bina Satu*, on the other. All are agreed that s 54 applies to perpetual injunctions only. The husband, apart from relying on *Penang Han Chiang*, has not advanced reasons to persuade this court to hold that s 54 applies to temporary injunctions as well, and I am not prepared in this case to so hold. The difference between *Vethanayagam*, on the one hand, and *Tan Suan Choo* and *Bina Satu*, on the other, is this, that while the two latter cases came to a stop on the construction that s 54 applies to perpetual injunctions, and does not apply to temporary injunctions, *Vethanayagam* went a step further in thinking that where a perpetual injunction is not available under s 54, a temporary

injunction cannot be available, not because s 54 applies also to temporary injunctions but as a matter of logic and commonsense on the basis that an order for a temporary injunction 'can be sought only in aid of a prospective order for a perpetual injunction'. *Vethanayagam* and the thinking in it were not considered in the two other cases.

[87] *Vethanayagam*, however, can only apply in cases where, in the main action, a perpetual injunction is sought which is disallowed by s 54, and, by an application in the main action, an interlocutory injunction to the same effect is sought under O 29 r 1 of the Rules of the High Court 1980 to preserve the status quo pending the trial of the action. In such cases the interlocutory injunction cannot be granted because it would be futile as an aid to a permanent injunction that in any event cannot be granted. To that extent *Vethanayagam* is still good law.

[88] In this case, however, where the interim injunction is sought under O 29, the injunction that is of concern is the injunction against proceedings, the injunction against conversion being in any case incapable of falling within s 54(b) because conversion does not involve the Syariah Courts. The petition for divorce does not seek any perpetual injunction against proceedings. The interim injunction that is sought is to preserve the status quo pending the disposal of the petition for divorce with its prayers for custody of children, maintenance, and a share of the marital home. Therefore *Vethanayagam* and s 54(b) do not apply in this case to disallow the grant of the interim injunction.

[89] The second issue concerning s 54 and paragraph (b), which is whether the injunction is an injunction 'to stay proceedings in a court not subordinate to that from which the injunction is sought', would be relevant only if s 54 applies also to temporary injunctions. Since it does not and this case does not fall under the Vethanayagam principle, even if the interim injunction sought fell within the words of paragraph (b), it would not prevent the granting of the interim injunction. So the second issue does not have to be decided.

THE QUESTION OF JURISDICTION

[90] It is time to deal with the question of jurisdiction. To begin with, leave of this court was granted in respect of the wife's substantive appeal on several questions which were agreed to between the parties, the main question being one concerning jurisdiction. The panel granting leave, however, added another question of its own to which the questions agreed to by the parties were subject, in that they would arise to be answered only if the panel's question was answered in the affirmative. That question is this:

1. Whether in an application for an interim injunction a court can make a final determination on issues of law, in particular, where it refers to a question of jurisdiction, as opposed to a consideration of only the existence of a serious issue of law to be determined?

[91] As so worded, it is a general question the answer to which will depend on the circumstances. In this case, however, both parties agreed before us that the question of jurisdiction could be finally determined in the interlocutory applications before the High Court. And in the High Court they agreed that it should be finally determined. Indeed the nature of the matters before the High Court, particularly the husband's application for the setting aside of the ex parte injunction on jurisdictional grounds, demanded that the question of jurisdiction be finally determined, and there was no fact in dispute relevant to the question of jurisdiction that needed to be established in a trial of the petition before the question of jurisdiction could be answered. As I said earlier on, it was inevitable, and needful, that the question of jurisdiction be decided at that stage. The answer to the panel's question has therefore to be in the affirmative in this case.

[92] The most important of the parties' questions, which they say is the heart of the appeal, is Question No 2.1:

2.1 In situations where one spouse in a marriage solemnised under the Law Reform (Marriage and Divorce) Act 1976 (a 'Law Reform Marriage') converts to Islam and the other does not, does the High Court or the Syariah Court have exclusive jurisdiction to grant decrees of divorce of such Law Reform Marriages and to make all other orders in respect of the division of matrimonial assets, the maintenance of spouse and of the children of the Law Reform Marriage ('children of the Law Reform Marriage'), the custody, care and control of the children of the Law Reform Marriage and all other matters incidental thereto?

As indicated at the beginning of this judgment, I shall be referring to a marriage that is called 'Law Reform Marriage' in the question, which the marriage in this case is, as a 'non-Muslim marriage'.

[93] Going solely by s 51 of the Law Reform Act, the answer to the question would be that, in such circumstances, the High Court has exclusive jurisdiction to dissolve the marriage and.make provision for the wife or husband, and for the support, care and custody of the children of the marriage'. But the question arises in this case because the husband in this case contends that in the.situations. posited in the question, the matters of dissolution of marriage, maintenance, custody and other ancillary reliefs are within the jurisdiction of the Syariah Courts, and since cl (1A) of art 121 of

A the Constitution declares that the secular courts.shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts', the High Court has no jurisdiction over such matters notwithstanding s 51, and that the Syariah Courts have the exclusive jurisdiction.

B THE JURISDICTION OF THE SYARIAH COURTS

[94] The jurisdiction of the Syariah Courts is defined in item 1 of List II (State List) in the Ninth Schedule to the Constitution. List II enumerates under various items the matters with respect to which the Legislature of a C State may make laws. Item 1 is one of the items. The matters set out in it are not numbered but are set out in bulk in a single long paragraph. It is convenient to set out those matters here in an itemized form, giving them sub-item numbers, and to refer to particular matters subsequently in this judgment by the sub-item numbers:

D

(i) Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable E trusts;

(ii) Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the F State;

(iii) Malay customs;

(iv) Zakat, Fitrah and Baitulmal or similar Islamic religious revenue;

G (v) mosques or any Islamic public places of worship;

(vi) creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List;

H (vii) the constitution, organization and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law;

I (viii) the control of propagating doctrines and beliefs among persons professing the religion of Islam;

(ix) the determination of matters of Islamic law and doctrine and Malay custom.

In respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, by virtue of item 6(e) of List 1 (Federal List), Parliament may make laws with respect to 'Islamic law therein to the same extent as provided in item 1 in the State List'.

[95] The Legislature of a State, for the State, and Parliament, for the Federal Territories, may, therefore, by virtue of sub-item (vii), make laws with respect to 'the constitution, organization and procedure of Syariah Courts'. Sub-item (vii) also defines the jurisdiction of the Syariah Courts. This is done by the words 'which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law', which for convenience will be referred to as the 'jurisdiction clause'. The words 'this paragraph' refer to item 1, which, as has been said, is one long paragraph. Not counting the jurisdiction in respect of offences, the jurisdiction clause limits the jurisdiction of the Syariah Courts in two aspects. The first aspect is personal. The jurisdiction is 'only over persons professing the religion of Islam'. It may be called the 'personal jurisdiction', although there could be a more appropriate term. The second aspect is material. The jurisdiction is 'in respect only of any of the matters included in this paragraph', that is to say, in item 1. It may be called the 'subject-matter jurisdiction', although the wife prefers to call it 'jurisdiction by legislative field'. The personal jurisdiction is important because one effect of it is that although a case — which term is used here to cover any suit, action, dispute, proceedings or application — before a Syariah Court may concern a subject matter that is within the jurisdiction of the Syariah Courts, the Syariah Courts will have no jurisdiction in respect of the case if the parties, or any of the parties, is not a Muslim, because exercising jurisdiction in the case will necessarily involve exercising jurisdiction over the non-Muslim parties or party, which jurisdiction the Syariah Courts are denied.

[96] Among the matters that fall within the jurisdiction of the Syariah Courts, that is to say, the matters included in item 1 of List II, is the matter in sub-item (i) of 'Islamic law relating to … marriage, divorce, … maintenance, guardianship …', which comes within the general description, as given in sub-item (i), of 'personal and family law of persons professing the religion of Islam'. Such being the qualification of the matters of marriage, divorce, maintenance and guardianship, and the personal jurisdiction of the Syariah Courts being such as has been set out, the matter of marriage must be a Muslim marriage, the matter of divorce must be the divorce of parties to a Muslim marriage, the matter of maintenance must be the maintenance of a spouse in a Muslim marriage, and the matter of guardianship must be the guardianship of children of a Muslim marriage. The legislative power given by

A sub-item (i) to make law with respect to marriage, and the judicial jurisdiction of the Syariah Courts given by sub-item (vii) in respect of marriage, must therefore be the power and jurisdiction in respect of Muslim marriages only. The same follows for the related or ancillary matters of divorce, maintenance and guardianship.

B

[97] The law that Parliament made for the Federal Territories with respect to the matter in sub-item (i) of item 1 of List II of Islamic law relating to marriage, divorce, maintenance and guardianship is the Family Law Act. The law that Parliament made pursuant to sub-item (vii) with respect to the C constitution and organization of Syariah Courts in the Federal Territories is Part IV (ss 40–57) of the Administration Act. Section 40 provides for the constitution of the Syariah Subordinate Courts, the Syariah High Court and the Syariah Appeal Court. Sections 46, 47 and 48 distribute the Syariah judicial jurisdiction among the three tiers of court. The jurisdiction of the D Syariah Subordinate Courts in s 47 follows that of the Syariah High Court in s 46 but with certain limitations. Paragraph (b) of s 46(2) sets out the actions and proceedings that the Syariah High Court 'shall … in its civil jurisdiction, hear and determine'. These are actions and proceedings which relate to:

E

(i) betrothal, marriage, ruju', divorce, nullity of marriage (fasakh), nusyuz, or judicial separation (faraq) or other matters relating to the relationship between husband and wife;

(ii) any disposition of, or claim to, property arising out of any of the F matters set out in subparagraph (i);

(iii) the maintenance of dependants, legitimacy, or guardianship or custody (hadhanah) of infants;

(iv) the division of, or claims to, harta sepencarian;

G

(v) wills or death-bed gifts (marad-al-maut) of a deceased Muslim;

(vi) gifts inter vivos, or settlements made without adequate consideration in money or money's worth, by a Muslim;

(vii) wakaf or nazr;

H

(viii) division and inheritance of testate or intestate property;

(ix) the determination of the persons entitled to share in the estate of a deceased Muslim or of the shares to which such persons are respectively entitled; or

I

(x) other matters in respect of which jurisdiction is conferred by any written law.

But the actions and proceedings are qualified in paragraph (b) by the requirement that they must be actions and proceedings 'in which all the parties are Muslims'. This requirement is consistent with what has been stated earlier as to one effect of the personal jurisdiction of the Syariah Courts being limited in the jurisdiction clause in sub-item (vii) of item 1 of List II by the words 'only over persons professing the religion of Islam'.

[98] The power of the High Court under s 51 of the Law Reform Act to dissolve the marriage in this case and to 'make provision for the wife or husband, and for the support, care and custody of the children of the marriage' can only be taken away in this case if cl (1A) of art 121 applies in this case, and it will apply if the matter of dissolution of marriage in the wife's petition before the High Court is a 'matter within the jurisdiction of the Syariah Courts'. If so, cl (1A) says that the High Court 'shall have no jurisdiction in respect of the matter'. To maintain, therefore, that cl (1A) does not operate in this case to oust the jurisdiction of the High Court under s 51 of the Law Reform Act, the wife has to show that the matter of dissolution of the marriage in this case is not a matter within the jurisdiction of the Syariah Courts. The position as to the consequential or ancillary matters in s 51(2) will follow that as to the dissolution of marriage because the making of provision as regards those matters is dependent upon the dissolution of the marriage.

THE WIFE'S BASIC ARGUMENT ON JURISDICTION

[99] The wife's basic argument is two-pronged. It looks first at the situation as if s 46(2) of the Family Law Act did not exist, that is, the situation under paragraph (b) of s 46(2) of the Administration Act only. Then it looks at s 46(2) of the Family Law Act and considers its effect.

[100] On the first prong, the wife argues that the Syariah Courts have no jurisdiction in respect of the matters in the petition before the High Court, which is a petition for dissolution of a non-Muslim marriage with its attendant prayers for maintenance and for a share in the marital home for the wife and for custody of the children of the marriage. The wife argues that in this case the Syariah Courts have no subject-matter jurisdiction and no personal jurisdiction. The Syariah Courts have no subject-matter jurisdiction because their jurisdiction is only in respect of a Muslim marriage, the dissolution of a Muslim marriage, maintenance for the spouse in a Muslim marriage and the guardianship or custody of children of a Muslim marriage, whereas the marriage of the parties in this case is a non-Muslim marriage. That argument is right and the husband has not attempted to counter it. I have already said that the subject-matter jurisdiction of the Syariah Courts in respect of marriage and matters related or ancillary to it is confined to

Muslim marriages. As to personal jurisdiction, the wife says that the Syariah Courts do not have personal jurisdiction to resolve the matrimonial and family dispute in this case because it is a dispute between a non-Muslim and a Muslim whereas, by paragraph (b) of s 46(2) of the Administrative Act (not to mention the Federal Constitution in the jurisdiction clause in sub-item (vii) of item 1 of List II), the Syariah Courts can only hear and determine actions and proceedings in which all the parties are Muslims.

[101] On the second prong, that which concerns s 46(2) of the Family Law Act, the wife argues that it is not a provision that confers on the Syariah Courts jurisdiction to grant a divorce. In other words, it is not a jurisdictional provision for the dissolution of a non-Muslim marriage. It is merely an administrative provision. More will be said of this later.

THE HUSBAND'S FIRST HEAD OF SUBMISSION

[102] On Question 2.1, the husband, in his main written submission dated 6 September 2007, argues under four heads of submission. The first head of submission is that 'the subject matter of this appeal' falls within the jurisdiction of the Syariah Courts. There are only two essential points under this head. The first essential point is in these words in paragraph 2.6:

> 2.6 Similarly, on the facts of this case only the eminent jurists who are properly qualified in the field of Islamic Jurisprudence would be able to decide what is the relevant Hukum Syarak, to a marriage of a non Muslim couple, where one spouse converts to Islam, as well as ancillary reliefs thereto such as maintenance of the non convert spouse, and the religion and custody of the children from marriage.

The point is that the Syariah Courts have jurisdiction in this case because of the availability there of eminent jurists in the field of Islamic jurisprudence. It is an argument that seeks to confer on the Syariah Courts jurisdiction by expertise. It is not a valid argument because what the husband needs to show is jurisdiction by statute.

[103] The word 'Similarly' at the beginning of that paragraph indicates a comparison with a passage quoted in the previous paragraph 2.5 from *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, a decision of the Supreme Court, on which the husband relies for that point.

[104] In that case the appellant Dalip Kaur sought a declaration that her deceased son, who had converted to Islam, was not a Muslim at the time of his death. The learned Judicial Commissioner in the High Court had rejected

evidence that the son had become a Sikh again before his death, and dismissed the appellant's application. The appellant's appeal to the Supreme Court was dismissed. Only Hashim Yeop A Sani CJ (Malaya) and Mohamed Yusoff SCJ wrote judgments. There is no indication of the views of the other member of the panel, Harun Hashim SCJ. Hashim Yeop A Sani CJ (Malaya) identified only two issues to be determined (page 6 I), both of which were decided against the appellant. One issue concerned 'the existence or otherwise of a genuine deed poll' which it was alleged evidenced the son's resumption of the Sikh faith. Mohamed Yusoff SCJ, however, had different grounds for dismissing the appeal. One of the grounds is in the passage relied upon by the husband, which appears at pp 9I–10B:

> The present question, in my view, cannot be determined by a simple application of facts as has been found by the learned judicial commissioner on the basis of veracity and relevancy of evidence according to civil law. Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.
>
> On this view it is imperative that the determination of the question in issue requires substantial consideration of the Islamic law by relevant jurists qualified to do so. The only forum qualified to do so is the syariah court.

That passage cannot be taken as binding authority for recognizing jurisdiction by expertise for the Syariah Courts. It represents the views of Mohamed Yusoff SCJ alone and not those of the Supreme Court.

[105] Before going on to the second essential point under the Husband's first head of submission in his main written submission, I wish to dispose of a point advanced by the husband's counsel in his oral submission that was subsequently incorporated in the husband's second additional submission dated 19 September 2007. Relying on sub-item (ix) of item 1 of List II — 'the determination of matters of Islamic law and doctrine and Malay custom' the husband argues in paragraph 6 of the second additional submission that 'the effects on the marriage in issue as the result of the husband's embracing Islam are matters of determination of Islamic law' and that the Syariah Courts have jurisdiction in respect of that subject matter, even though the jurisdiction is not expressed in the Administration Act and even though the wife is not a Muslim. The husband would bring the matter of sub-item (ix) of item 1 of List II within subparagraph (x) of the list of matters in paragraph (b) of s 46(2), which says 'other matters in respect of which jurisdiction is conferred by any written law', the Constitution, of which List II forms a part, being regarded as included in the 'written law' in the said subparagraph (x). I reject this argument because in any event I think it is far fetched to regard the matters in dispute in this case as being the effects on the marriage in this case of the husband's conversion to Islam, and to regard such effects as matters of determination of Islamic law. The effect of the conversion on the

marriage is that under s 51 of the Law Reform Act the wife is entitled to petition for divorce and under s 46(2) of the Family Law Act the Syariah Courts are empowered to confirm that the conversion has operated to dissolve the marriage. The effects are already spelt out by statute and are not a matter of determination of Islamic law. What is in dispute as concerns the effect of the husband's conversion on the marriage is the question of jurisdiction of courts and that is to be decided by reference to statute and not through the determination of what is the Islamic law on some question.

[106] The second essential point under the husband's first head of submission is in paragraph 2.10:

> In this case therefore, only the Syariah Court can validly determine the effect to the marriage and/or ancillary reliefs subsequent to the dissolution of the marriage solemnised under the LRA between non-Muslim upon the conversion into Islam by one spouse. As from 10 June 1988 jurisdiction of Civil Court which was hitherto enjoyed had expressly been taken away by art 121(1A) of Federal Constitution.

The submission does not state by which statutory provision the Syariah Courts 'can validly determine' the effect of the marriage, but, looking at the previous paragraphs, it may be inferred that the provision intended is sub-item (vii) of item 1 of List II, read with sub-item (i), which gives to the Syariah Courts subject-matter jurisdiction in respect of marriage and matters related thereto, but the submission fails to address the point, which is a valid one, that the jurisdiction is only in respect of Muslim marriages. Thus far only extend the husband's points for contending that the Syariah Courts have subject-matter jurisdiction in this case under paragraph (b) of s 46(2) of the Administration Act. The points have no merit.

THE HUSBAND'S SECOND HEAD OF SUBMISSION

[107] The word 'therefore' at the beginning of the aforesaid paragraph 2.10 under the husband's first head of submission indicates a conclusion from previous paragraphs, the last being paragraph 2.9, which says that this court, in *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585, has, at p 616, affirmed the correctness of the decision of this court in *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam (Perkim) Kedah & Anor* [1999] 1 MLJ 489, which the husband says adopted the subject-matter approach to the question of jurisdiction of Syariah Courts. The importance to the husband of promoting the subject-matter approach lies in his second head of submission, which is that the words 'shall have jurisdiction only over persons professing the religion of Islam' in the jurisdiction clause in sub-item (vii) of item 1 of List II and the words 'shall … hear and determine all actions and proceedings in which all the parties are

Muslims' in paragraph (b) of s 46(2) of the Administration Act, which in both places refer to the Syariah Courts, do not oust the jurisdiction of the Syariah Courts. The principal reason for that contention is given in paragraph 3.1 of the husband's main Written Submission:

> 3.1 The now well recognised 'subject matter' approach as submitted herein above, has clearly settled the point that these phrases are irrelevant for consideration, and made redundant.

What the husband is saying there is that the authorities have established that the jurisdiction of the Syariah Courts is to be determined only by subject matter and not — notwithstanding those important words in the Constitution and in the Administration Act — according to the religion of the parties concerned as well. The husband would go only by the subject-matter jurisdiction. To him the personal jurisdiction is irrelevant. To him, therefore, so long as the Syariah Courts have subject-matter jurisdiction, they have jurisdiction over the matter even if a party to the case before them is not a Muslim. And he says that the authorities have so established. The authorities cited by the husband in his first head of submission will now be examined to see whether they bear out the husband's contention that the Syariah Courts' personal jurisdiction, or the words that define it, are irrelevant.

[108] In *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793, the wife had filed a petition for divorce in the Syariah Court. While the petition was pending, she filed a summons in the High Court against the husband for damages for assault and battery and for an injunction against molestation. She obtained an ex parte interim injunction. The husband applied to set aside the injunction and to strike out the wife's action. The question was whether cl (1A) of art 121 ousted the jurisdiction of the High Court in respect of the matters in the wife's action. The Supreme Court held that it did, because the Syariah Court had been conferred with jurisdiction in respect of the matters before the High Court. It is not necessary here to state why the Supreme Court found that the Syariah Court had been conferred with jurisdiction in respect of those matters, because the point for present purposes is that it was a decision according to subject-matter jurisdiction, and that was so simply because that was the question that happened to arise. The question of personal jurisdiction was not considered because it did not arise, and could not have arisen, because both parties were Muslim.

[109] In *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681, the plaintiff, a Buddhist by birth who had embraced Islam, applied in the High Court for a declaration that his

A subsequent renunciation of Islam by deed poll was valid. A preliminary issue fell to be decided as to the jurisdiction of the High Court to entertain the application in view of cl (1A) of art 121. At p 684, Abdul Kadir Sulaiman J (as he then was), asked essentially two questions. First, 'Is the matter of the declaration sought by the plaintiff … a matter within the jurisdiction of the
B Syariah Courts and therefore, this court is prevented by art 121(1A) … from adjudicating?'. Second, 'Is [the jurisdiction of the Syariah Courts] confined only to those express jurisdiction given by the relevant State Enactment or the wider jurisdiction of the courts which includes those jurisdiction which is not so expressly enacted but inherent in the courts itself?" What the learned judge
C meant by the wider, inherent jurisdiction in the second question is explained at p 687: 'If I may call, the wider jurisdiction given by para 1 of List II … is the jurisdiction inherent in the a Syariah Court subject of course to the right to exercise that jurisdiction is being expressly given by the [Administration Act] which power is within the competency of the legislature
D to do under art 74'.

[110] The two questions relate to subject-matter jurisdiction. No question arose as to personal jurisdiction. As far as concerns point of principle, the
E important question is the second question, because a distinction was made between subject-matter jurisdiction as set out in the statute that constitutes the Syariah Courts and the subject-matter jurisdiction given by the words 'which shall have jurisdiction … in respect of any of the matters included in this paragraph' in the jurisdiction clause in sub-item (vii) of item 1 in List II,
F that is, judicial jurisdiction in respect of matters in item 1, which are basically matters of legislative power. In other words, the question was: in order to determine what the jurisdiction of the Syariah Courts is, does one look only at the statute that constitutes the Syariah Courts, or does one also look at item 1 of List II, so that even if a matter of jurisdiction is not stated in the
G statute, the Syariah Courts have jurisdiction in respect of the matter if it is stated in item 1 or is capable of falling within a matter that is stated in item 1?

[111] The second question was answered first, and in these words at p 685:

H
> To my mind, having considered art 74 and para 1 of the State List in the Constitution, the jurisdiction of the Syariah Court is much wider than those expressly conferred upon it by the respective State legislature. The Syariah Court shall have jurisdictions over persons professing the religion of Islam in respect of any of the matters included in para 1 thereof. It is not to be limited only to those
I expressly enacted.

[112] That principle having been determined, the answer to the first question followed at p 686. The answer is not necessary for the present discussion. It is merely an application of the principle. The learned judge

picked on the matter of 'personal … law of persons professing the religion of Islam' in sub-item (i) of item 1 of List II as a matter in respect of which the Syariah Courts have jurisdiction and held that the matters in the plaintiff's application fell within that matter in sub-item (i).

[113] *Md Hakim Lee* happened to be a case concerning subject matter jurisdiction. No dispute or question arose about the personal jurisdiction of Syariah Courts.

[114] The next authority is *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam (Perkim) Kedah & Anor* [1999] 1 MLJ 489, a decision of this court. The appellant, who was brought up as a Sikh but converted to Islam, subsequently renounced Islam and sought in the Kuala Lumpur High Court a declaration that he was no longer a Muslim. The High Court dismissed the application on the ground that the subject matter in the application fell within the jurisdiction of the Syariah Courts and therefore, in view of cl (1A) of art 121, the High Court had no jurisdiction. The passage earlier quoted from the judgment of Mohamed Yusoff SCJ in *Dalip Kaur* was considered by the High Court and this court, which dismissed the appellant's appeal on the ground that 'conversion out of Islam (apostasy)' fell within the jurisdiction of the Syariah Courts.

[115] The reason why this court found that apostasy fell within the jurisdiction of the Syariah Courts can be seen in the passage at pp 501–502. It proceeds from the perception that 'it is clear that all State Enactments and the Federal Territories Act contain express provisions vesting the Syariah Courts with jurisdiction to deal with conversion to Islam', a perception which was not entirely correct, because at least where the 'Federal Territories Act', that is the Administration Act, is concerned, conversion to Islam is not a judicial matter within the jurisdiction of the Syariah Courts but an administrative matter under Part IX of the Act, involving only the Registrar of Muallafs. Be that as it may, from that perception follow three important statements in that passage. 'Be that as it may, in our opinion, the jurisdiction of the Syariah Courts to deal with the conversion out of Islam, although not expressly provided in the State Enactments can be read into them by implication derived from the provisions concerning conversion into Islam'. 'Therefore, when jurisdiction is expressly conferred on the Syariah Courts to adjudicate on matters relating to conversion to Islam, in our opinion, it is logical that matters concerning conversion out of Islam (apostasy) could be read as necessarily implied in and falling within the jurisdiction of the Syariah Courts'. 'In short, it does seem inevitable that since matters on conversion to Islam come under the jurisdiction of the Syariah Courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts'.

[116] By nature, therefore, it was a decision as to subject-matter jurisdiction, not as to jurisdiction by expertise as in the judgment of Mohamed Yusoff SCJ in *Dalip Kaur*. This court, in *Soon Singh*, did not say, as Mohamed Yusoff SCJ in effect said in *Dalip Kaur*, that the Syariah Courts have, or should have jurisdiction, over the matter of apostasy of a Muslim because the available expertise on the matter is there. This court still attempted to find jurisdiction on the basis of subject-matter jurisdiction as provided by statute, and found jurisdiction by necessary implication from an expressly provided, as perceived, subject-matter jurisdiction. By nature, the finding in *Soon Singh* that the Syariah Courts have jurisdiction in respect of apostasy is a finding as to subject-matter jurisdiction, because implying that jurisdiction from the perceived express jurisdiction in respect of conversion to Islam is like finding that that jurisdiction exists in the statute although lurking behind the express jurisdiction.

[117] The judgment of Mohamed Yusoff SCJ in *Dalip Kaur* played a part in that decision only as providing one reason for implying subject-matter jurisdiction. This can be seen in the following words immediately after the second of the statements quoted earlier:

> One reason we can think of is that the determination of a Muslim convert's conversion out of Islam involves inquiring into the validity of his purported renunciation of Islam under Islamic law in accordance with Hukum Syarak (*Dalip Kaur*). As in the case of conversion to Islam, certain requirements must be complied with under Hukum Syarak for a conversion out of Islam to be valid, which only the Syariah Courts are the experts and appropriate to adjudicate.

But that was not the basis of the decision in *Soon Singh*. This will be clearly seen if it be considered that if the Syariah Courts had not been perceived to have express jurisdiction in respect of conversion to Islam, *Soon Singh* would not have been decided as it was.

[118] What needs to be observed about *Soon Singh* for the purposes of paragraph 3.1 of the husband's second head of submission is that it was a decision as to subject-matter jurisdiction and not as to personal jurisdiction. The question of personal jurisdiction did not arise for consideration in *Soon Singh*.

[119] Finally, there is this court's judgment in *Majlis Agama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily Shaik Natar & Ors* [2003] 3 MLJ 705. It was a dispute about certain lands which became subject to a wakaf under a will and a deed of settlement. The respondents, as plaintiffs in the High Court, wanted the lands to revert to the estate of the deceased Muslim testator. The appellant Majlis sought the striking out of the action on the ground that the subject of a will of a deceased Muslim being within the

jurisdiction of the Syariah Courts, the High Court, because of cl (1A) of art 121, had no jurisdiction to hear the action. The appellant failed in the High Court and the Court of Appeal. The High Court ruled that the Syariah Courts had no jurisdiction for two reasons. First, because one of the reliefs sought was an injunction to preserve the lands and the Syariah Courts had no jurisdiction to issue injunctions. Secondly, because the Syariah Courts had no power to adjudicate on the will and deed of settlement. The second reason was clearly wrong, and this court so ruled, because under the relevant Enactment the Syariah Courts had power to determine actions and proceedings relating to wills of a deceased Muslim and wakaf. That was a ruling on subject-matter jurisdiction.

[120] It is the first reason that is of interest. It was arrived at in reliance on the Supreme Court's decision in *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman dan satu yang lain* [1992] 2 MLJ 244, where cl (1A) of art 121 came into play in relation to a dispute about the demolition of a mosque and where one of the reliefs sought was an injunction to preserve the mosque, that the Syariah Court had no jurisdiction to hear claims where the orders sought fall outside the jurisdiction of the Syariah Court to grant. It introduced what Abdul Hamid Mohamad J (as he then was), in *Abdul Sheik Md Ibrahim & Anor v Hussein Ibrahim & Ors* [1999] 3 CLJ 539, termed the 'remedy prayed for' approach, as opposed or in addition to the 'subject matter' approach to the question of the jurisdiction of the Syariah Courts in the context of cl (1A) of art 121. Those terms appear at p 546h of *Abdul Sheik Md Ibrahim*. In that case a similar situation arose and the learned judge declined to follow the remedy-prayed-for approach. This court in *Shaik Zolkaffily* agreed 'that *Isa Abdul Rahman* cannot be supported' (p 714) and said that the learned judge in *Shaik Zolkaffily* should have taken the subject-matter approach rather than the remedy-prayed-for approach (p 715). That was the demise of the remedy-prayed-for approach.

[121] In this connection I may mention that from the judgment of Aziah Ali JC in the High Court it might appear that the question of the remedy-prayed-for approach did arise in the High Court. In paragraph 19 she said: '[The husband's counsel] submits that in determining whether this court or the Syariah Court has jurisdiction, the subject-matter approach should be adopted as opposed to the remedy approach submitted by counsel for the [Wife]'. But nowhere else in the judgment is there an indication that the wife's counsel did urge for the 'remedy approach', if what was meant by that was the remedy-prayed-for approach of *Isa Abdul Rahman*. From paragraph 12 it would appear that, apart from subject-matter jurisdiction, the wife relied on personal jurisdiction. This may be seen in the words: 'It was submitted [by the wife] that the Syariah Court has no jurisdiction as one

A party to the dispute is not a person professing the religion of Islam', but the learned judicial commissioner did not make a ruling as to personal jurisdiction.

[122] In *Shaik Zolkaffily* this court also agreed with what it termed the B 'implication approach' of *Soon Singh* of implying subject-matter jurisdiction of Syariah Courts from a subject matter expressly provided for in the relevant statute. It also agreed with the wide approach taken by Abdul Kadir Sulaiman J in *Md Hakim Lee* of looking to item 1 of List II for the subject-matter jurisdiction of the Syariah Courts in respect of a matter where C the matter is not expressed in the statute constituting the Syariah Courts. Accordingly (page 308g) this court was unable to support the approach, which it said was a narrow approach, taken by Harun Hashim SCJ in *Mohamed Habibullah* in these words at p 800F:

D > I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the Syariah Court has jurisdiction and not whether the state legislature has power to enact the law conferring jurisdiction on the Syariah Court.

E **[123]** But this court has recently in *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101, expressed a contrary opinion. Referring to the jurisdiction clause in sub-item (vii) of item 1 of List II, Abdul Hamid Mohamad FCJ (as he then was) said at p 116:

F > [43] What it means is that, the Legislature of a State, in making law to 'constitute' and 'organise' the Syariah Courts shall also provide for the jurisdictions of such courts within the limits allowed by item 1 of the State List, for example, it is limited only to persons professing the religion of Islam. The use of the word 'any' between the words 'in respect only of' and 'of the matters' means that the State G Legislature may choose one or more or all of the matters allowed therein to be included within the jurisdiction of the Syariah Courts. It can never be that once the Syariah Courts are established the courts are seized with the jurisdiction over all the matters mentioned in item 1 automatically. It has to be provided for.

H **[124]** Since in this case the husband is not relying on any subject matter in item 1 of List II, except sub-item (x), reliance on which I have held in any case to be far-fetched [at 105], it is not necessary to express an opinion on the apparent conflict between *Shaik Zolkaffily* and *Latifah bt Mat Zin* on this point of subject-matter jurisdiction, except to make certain observations, I which may be useful for the future, in reference to Abdul Kadir Sulaiman J's opinion in *Md Hakim Lee* that the subject-matter jurisdiction of the Syariah Courts in respect of a matter in item 1 of List II that is not expressly included in the statute constituting them is an 'inherent' jurisdiction and that, as I understand the learned judge, it ceases to be inherent only when the matter

is expressed in the statute. I wonder whether the subject-matter jurisdiction expressed in the jurisdiction clause in sub-item (vii) of item 1 of List II is not, instead, and contrary to the perception of Abdul Hamid Mohamad FCJ, a direct conferment of jurisdiction on the Syariah Courts. I will repeat the words of the relevant part of the jurisdiction clause: 'which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph'. Grammatically it is an adjectival clause qualifying 'Syariah courts'. It is not a noun clause and therefore is not a 'matter' like other matters in item 1, which are basically legislative matters in respect of which laws may be made. It circumscribes the jurisdiction of the Syariah Courts. The matters to be legislated for in respect of Syariah Courts are their 'constitution, organization and procedure'. Their jurisdiction is not included among those matters and I wonder whether that is because their jurisdiction is directly given and limited by the jurisdiction clause. Further, could the word 'any' in the phrase 'and in respect only of any of the matters included in this paragraph' be not an 'any' implying choice, as Abdul Hamid Mohamad FCJ seems to regard it, but an 'any' that in law amounts to 'every'? Finally, there is the matter of a difference to be seen when sub-item (vii) is compared with the subject of native courts in item 13 under List IIA, which is a List of additional matters with respect to which the Legislatures of the States of Sabah and Sarawak may make laws. The words are: 'the constitution, organization, and procedure of native courts (including the right of audience in such courts), and the jurisdiction and powers of such courts, which shall extend only to the matters in this paragraph and shall not include jurisdiction in respect of offences except in so far as conferred by federal law'. It can be seen that the jurisdiction and powers of native courts are made the subject of legislation and the adjectival clause that begins with the words 'which shall extend only … ' qualifies the 'jurisdiction and powers' to be legislated for, so that it is clear that the jurisdiction and powers of native courts are to be legislated for.

[125] Coming back to *Shaik Zolkaffily*, it can be seen that in that case the question of personal jurisdiction did not arise for decision. It could not have arisen because the respondents were Muslim, and although the appellant Majlis was a body, it would appear that the parties were treated as Muslim. And in none of the other cases already considered, that were cited by the husband, did the question of personal jurisdiction arise for consideration. The apex court has not decided that the subject-matter approach is the only permissible approach to determining the jurisdiction of the Syariah Courts and that the question of personal jurisdiction is irrelevant.

[126] On the contrary, the Supreme Court did recognize the importance of personal jurisdiction in *Tang Sung Mooi (f) v Too Miew Kim* [1994] 3 MLJ 117, which the wife relies on. That case involved non-Muslim parties to a

non-Muslim marriage. On the petition of the wife, the High Court dissolved the marriage. Pending the decree nisi being made absolute, the wife applied for ancillary reliefs under ss 76 and 77 of the Law Reform Act. The husband, who, after the application, converted to Islam, contended that the High Court no longer had jurisdiction over him because, by its s 3(3), the Law Reform Act shall not apply to a Muslim, and that only the Syariah Court had jurisdiction in respect of matters ancillary to the divorce. The High Court referred two questions for the opinion of the Supreme Court. As regards the second question, the Supreme Court said: 'In practical terms, we are asked to decide, in view of s 3(3) of the Act, whether the High Court has jurisdiction to continue to hear the [wife's] application for ancillary reliefs under ss 76 and 77 of the Act against the [husband], who converted to Islam after the dissolution of their non-Muslim marriage' (p 1805 lines 15–20). That question was answered in the affirmative.

[127] It is the first question that is of importance to the present discussion: 'Is s 3 of the [Law Reform Act] unconstitutional in the light of arts 11(1) and 121(1A) of the Federal Constitution?' (p 122). Article 11(1) guarantees every person the right to profess and practise his religion. That question arose because the wife had contended (p 122) 'that s 3(3) was unconstitutional insofar as it prevented the High Court from granting her the order for ancillary reliefs, as she would effectively have no remedy in law against the [husband]', she being a non-Muslim and unable to come under the jurisdiction of the Syariah Courts. The Supreme Court ruled that s 3 is not unconstitutional. In relation to art 11(1), the Supreme Court said that s 3(3) is consistent with it. The Supreme Court next went on to consider 'the effect of art 121(1A) … on the jurisdiction of the High Court vis-a-vis the present ancillary application' (p 125). It looked at s 45(3)(b) of the Administration Act then in force in the Federal Territory of Kuala Lumpur, namely, the Selangor Administration of Muslim Law Enactment 1952, with its provision that the Kathi's Court 'shall in its civil jurisdiction hear and determine all actions and proceedings in which all the parties profess the Muslim religion …' (pp 125–126), and concluded:

> It is thus clear from the above section that the Syariah Court Kuala Lumpur would not have jurisdiction over the petitioner who is a non-Muslim. It follows that art 121(1A) … does not affect the jurisdiction of the High Court to hear the application under ss 76 and 77 of the Act.

[128] The husband argues in paragraph 2.1 of his Additional Written Submission dated 17 September 2007 that the wife's reliance on Tan Sung Mooi is 'factually erroneous' because in that case the parties were non-Muslim until just before the wife's application for ancillary reliefs came to be heard whereas in the present case the husband converted to Islam before the wife

presented her petition. But the factual difference is not of any significance, because in that case the husband, relying on cl (1A) of art 121, contended that, he being now a Muslim, the High Court no longer had jurisdiction over him in view of s 3(3) of the Law Reform Act and that only the Syariah Court had jurisdiction in respect of matters ancillary to the divorce. That, together with the wife's contention in opposition, gave rise to the first question, in answering which the Supreme Court had to decide whether the Syariah Court had personal jurisdiction in that case in order to decide on the effect of cl (1A) on the jurisdiction of the High Court. It decided that the Syariah Court had no personal jurisdiction.

[129] There has been no decision of the apex court since to the contrary. The decision remains good. In fact, in *Latifah bte Mat Zin*, in a passage at p 638, paragraph [44], that seeks to make the point that even if the Syariah Courts do not have jurisdiction in respect of a matter, it does not mean that the jurisdiction is with the High Court but one must still look to see whether the High Court has, by statute, jurisdiction in respect of that matter, Abdul Hamid Mohamad FCJ made this important and clear statement: 'So, to take the example given earlier, if one of the parties is a non-Muslim, the Syariah Court does not have jurisdiction over the case, even if the subject matter falls within its jurisdiction'. Although the husband's counsel submitted that the statement was an obiter dictum, it is a correct statement; it accords with Tan Sung Mooi and, what is more important, it gives due recognition to the intention of the Constitution in sub-item (vii) of item 1 of List II and of the Administration Act in paragraph (b) of s 46(2).

[130] The husband's submission in paragraph 3.1 under his second head of submission to the effect that the authorities have established that the approach to determining the jurisdiction of the Syariah Courts is only the subject-matter approach, and not also the personal jurisdiction approach, is therefore incorrect.

[131] I am still on the husband's second head of submission, which is about personal jurisdiction. Under this head the husband further argues in paragraph 3.2, as I understand the argument, that even if the Syariah Court has no jurisdiction in cases involving a non-Muslim, it is 'seised with jurisdiction, if the person concerned waives his immunity to its jurisdiction or surrenders his immunity'. In support of this argument the husband cites authorities cited in *Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah ibni Almarhum Sultan Abu Bakar Ri'Ayatuddin Al Mu'Adzam Shah (sued in his personal capacity)* [1996] 1 MLJ 617 and statements made by the learned judges in that case about the immunity of Rulers, sovereigns and diplomats from being sued unless they waive the immunity. The suggestion is that the restriction imposed by the Constitution and by the

relevant statute on the jurisdiction of the Syariah Courts in respect of non-Muslims can be waived and a non-Muslim is not entitled to object to the jurisdiction of the Syariah Courts on that ground because of his ability to opt to submit to their jurisdiction. In paragraph 3.4 the husband says:

> Hence it is crystal clear that the objection of the [Wife] to be made subject to the jurisdiction of the Syariah Court, on the ground that the Syariah Court has no jurisdiction on non-Muslim is a non-starter. It is for the non-Muslim to waive his immunity.

[132] I do not think it is valid to resort to the incidence of waiver of immunity on the part of Rulers, sovereigns and diplomats from the jurisdiction of courts to argue that a Syariah Court will have jurisdiction over a non-Muslim, despite the restriction on personal jurisdiction imposed by sub-item (vii) of item 1 of List II and paragraph (b) of s 46(2) of the Administration Act, if he agrees to submit to jurisdiction. The comparison is not valid. The restriction on jurisdiction is constitutional and statutory. The words in sub-item (vii) are strict — 'which shall have jurisdiction only over persons professing the religion of Islam'. No waiver can clothe the Syariah Courts with jurisdiction that is constitutionally and statutorily denied them. In *Federal Hotel Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers* [1963] 1 MLJ 175, this court said at page 178G (left): 'It is a fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction …'.

[133] One of the questions on which this court granted the wife leave to appeal in respect of the substantive appeal is the following:

> 2.7 Can provisions such as section 53 of the 1993 Act be read as including within their ambit persons not professing the religion of Islam?

Before going on to the next submission that the husband makes under his second head of submission, it is appropriate to consider Question 2.7 because the husband's next submission involves s 53(1) of the Administration Act, that is the 1993 Act, which says:

> 53(1) The Syariah Appeal Court shall have supervisory and revisionary jurisdiction over the Syariah High Court and may, if it appears desirable in the interest of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceedings, whether civil or criminal, in the Syariah High Court, call

for and examine any records thereof and may give such directions as justice may require. A

[134] The answer to Question 2.7 depends on whether the Syariah Appeal Court has jurisdiction to deal with a case involving a non-Muslim party or parties. The words 'in which all the parties are Muslims' in paragraph (b) of s 46(2) of the Administration Act apply to the Syariah High Court and, since the jurisdiction of the Syariah Subordinate Court follows that of the Syariah High Court, also to the Syariah Subordinate Court. There are no such words applying to the Syariah Appeal Court. There are, however, the words 'which shall have jurisdiction only over persons professing the religion of Islam' in the jurisdiction clause in sub-item (vii) of item 1 of List II, which apply to all Syariah Courts, including the Syariah Appeal Court, and were it not for what Abdul Hamid Mohamad FCJ said in paragraph [43] at p 638 of *Latifah bte Mat Zin*, quoted earlier, I would not hesitate to hold that by those words in the jurisdiction clause the Syariah Appeal Court has no jurisdiction to deal with a case involving a non-Muslim party or parties. The said paragraph [43] seems to suggest that even those words in the jurisdiction clause that restrict the personal jurisdiction of Syariah Courts do not operate directly and that the restriction has to be legislated for in the statute that constitutes the Syariah Courts before it can operate. B C D E

[135] Be that as it may, even without having to resort to those words in the jurisdiction clause, I am of opinion that the Syariah Appeal Court has no jurisdiction to deal with cases involving a non-Muslim party or parties, simply because the cases that it deals with, whether on appeal or on revision or by way of supervision, are cases in or from the Syariah High Court, where the bar of personal jurisdiction is put in place. A case involving a non-Muslim party or parties is prevented by that bar from reaching the adjudication of the Syariah High Court. If it cannot go there, it cannot go beyond. It amounts to the Syariah Appeal Court being restricted in its personal jurisdiction as an inevitable consequence of the restriction placed on the Syariah High Court. The answer to Question 2.7 is therefore in the negative. F G

[136] What the husband does next under his second head of submission is to attempt, in paragraphs 3.5.1 to 3.6.1, to reinforce his 'proposition' about waiver of immunity by referring to s 53(1). He says that the provision is consistent with the guarantee of equal treatment in art 8(1) of the Constitution because it 'is wide enough for the appellant non-Muslim wife to be an applicant or plaintiff in any matters before the Syariah Courts, and not compelled to become a mere respondent or defendant'. The suggestion is that there is equality, because while the husband goes to the Syariah High Court H I

with his application for custody as a plaintiff or applicant against the wife, the wife can also, at the same time, go to the Syariah Appeal Court as a plaintiff or applicant against the husband. The suggestion as to equality is ludicrous because the jurisdiction under s 53 is supervisory or revisionary, whereas the jurisdiction of the Syariah High Court is original. In any case, the Syariah Appeal Court would have no jurisdiction to entertain the non-Muslim wife.

[137] Section 53 was referred to by Hasan Lah JCA in his judgment in the Court of Appeal in paragraph 17. But his point was not quite what the husband seeks to make in this appeal. His point was that although the wife was unable to obtain an injunction because of s 54(b) of the Specific Relief Act 1950, she still could have recourse to s 53 of the Administration Act. He said:

> I think the wording in that section is wide enough to enable the wife to apply to the Syariah Appeal Court to exercise its supervisory and revisionary powers to make a ruling on the legality of the husband's application and the interim order obtained by the husband on the ground that the Syariah Court had no jurisdiction over the matter as she is not a person professing the religion of Islam. The wife could have done that rather than asking the Civil Court to review the Syariah Court's decision.

The suggestion of course assumed that waiver of immunity would be available to the wife, whereas it is not. What is, however, interesting to observe from that passage is that in making that suggestion Hasan Lah JCA must have felt confident that the wife would succeed in the Syariah Appeal Court, which means that he would have held the opinion that the Syariah Courts did not have personal jurisdiction over the matter because the wife was not a Muslim, which he, however, did not express in a specific finding. Another thing to remark about that passage is that the wife was not asking the High Court to review the Syariah Court's decision. She was seeking an injunction.

[138] The husband concludes his second head of submission by arguing that s 51(1) of the Law Reform Act is 'ultra vires' art 8(1) of the Constitution because, unlike what he conceives s 53 of the Administration Act to be, s 51(1) is unfair and unjust to the Muslim spouse because the non-Muslim spouse is always the petitioner under it whereas the Muslim spouse is always the respondent. But the perceived unfairness or injustice arises from the policy of s 51(1) of giving the non-converting spouse the right to apply under s 51, which is a sound policy because it is the converting spouse that has upset the marriage under the Law Reform Act by converting. It is the converting spouse who is, in the context of such a marriage, the reneging party. It is therefore fair and just that the 'innocent' party, whether it be the wife or the husband, be given the right to petition for dissolution of the marriage.

THE HUSBAND'S THIRD HEAD OF SUBMISSION

[139] The husband's third head of submission is that, under Syariah jurisprudence that is applied by the Syariah Courts, the non-Muslim spouse can enjoy similar or better remedies when compared to the High Court. This head of submission is not relevant to the question of personal jurisdiction of Syariah Courts which is a question that is dependent on statutory interpretation and not on the beneficence of courts.

[140] For a reason that I will state when I come to deal with it, I will deal with the husband's fourth head of submission later.

THE SYARIAH HIGH COURT'S SUBJECT-MATTER JURISDICTION: CONCLUSION

[141] I can now conclude on the wife's first prong of argument on the issue of jurisdiction that the Syariah High Court has no jurisdiction under section 46 of the Administration Act to hear and determine actions relating to a non-Muslim marriage, which the marriage in this case is. It has therefore no subject-matter jurisdiction in this case under s 46(2) of the Administration Act. The matter of the dispute between the parties in this case is therefore not a matter within the jurisdiction of the Syariah High Court. Clause (1A) of art 121, which denies to the secular courts jurisdiction in respect of 'any matter within the jurisdiction of the Syariah Courts', therefore does not operate to deny to the High Court jurisdiction in respect of the matter that is given by s 51 of the Law Reform Act. This last conclusion about Clause (1A) prevails irrespective of the question of the effect on it of the finding that the Syariah Courts also have no personal jurisdiction in this case.

SECTION 46(2) FAMILY LAW ACT

[142] But that conclusion does not take into account s 46(2) of the Family Law Act under which the husband applied to the Syariah Subordinate Court and which the wife's second prong of argument on jurisdiction addresses. It is now necessary to consider that section.

[143] Section 46(2) of the Family Law Act has to be considered in the light of s 45 of that Act, which provides as follows:

> 45. Save as is otherwise expressly provided, nothing in this Act shall authorize the Court to make an order of divorce or an order pertaining to a divorce or to permit a husband to pronounce a talaq except —

A (a) where the marriage has been registered or deemed to be registered under this Act; or

(b) where the marriage was contracted in accordance with Hukum Syarak; and

B (c) where the residence of either of the parties to the marriage at the time when the application is presented is in the Federal Territory.

The effect of the section is to confine the authority of the Syariah Courts to bring about a dissolution of marriage only to Muslim marriages, unless it is C otherwise expressly provided.

[144] The question is whether s 46(2) of the Family Law Act expressly provides otherwise. In my opinion it does not. It does not enable a Syariah Court to bring about a dissolution of a non-Muslim marriage where a party D to it has converted to Islam. It is obvious from the very wording of the section that it is predicated on the supposition that in Islamic law the conversion of a party to Islam by itself may or does operate to dissolve the marriage. The section prevents that supposition from having a legal effect unless and until it is confirmed by the Syariah Court. What the Syariah Court does E under the section is merely to confirm that the conversion has operated to dissolve the marriage. It is confirmation of the consequence on the marriage, according to Islamic law, of the act of one of the parties. The Syariah Court does not do anything under s 46(2) to bring about dissolution of the marriage. It merely confirms that a dissolution has taken place by reason of F conversion. I agree with the wife that s 46(2) does not confer jurisdiction on the Syariah Courts to dissolve a non-Muslim marriage. In relation to that section, therefore, cl (1A) of art 121 does not apply to deprive the High Court of jurisdiction under s 51 of the Law Reform Act.

G **[145]** In his second additional submission dated 19 September 2007, the husband seeks to bring the function under s 46(2) of the Family Law Act within the jurisdiction of the Syariah Courts by relying on subparagraph (x) of paragraph (b) of s 46(2) of the Administration Act, which requires the Syariah High Court to hear and determine all actions and proceedings which H relate to 'other matters in respect of which jurisdiction is conferred by any written law', s 46(2) of the Family Law Act being treated as the 'written law' intended by the said paragraph (x). It is an attempt to bring the function under s 46(2) of the Family Law Act within the subject-matter jurisdiction of the Syariah Courts under paragraph (b) of s 46(2) of the Administration Act. I But under that paragraph (b) the personal jurisdiction must also be satisfied because of the words 'in which all the parties are Muslims' which qualify actions and proceedings, whereas a case under s 46(2) of the Family Law Act has to involve a non-Muslim party. As has been seen, the husband's application under the section cited the wife as the respondent. Therefore the

function under s 46(2) of the Family Law Act cannot be brought within the jurisdiction of the Syariah Courts under paragraph (b) of s 46(2) of the Administration Act.

[146] In paragraph 4 of his Second Additional Submission, the husband says: 'By its nature, the jurisdiction in s 46(2) of [the Family Law Act] necessarily involves the rights and obligations of the non-Muslim spouse in the marriage as well'. It is not clear what the husband intends to say by those words. Perhaps he means to say that the section also enables the Syariah Court, upon confirming that the conversion of the converting spouse has operated to dissolve the non-Muslim marriage, to make ancillary orders, including custody of children. Whether or not that is his intention, it has to be said that the section does not enable the Syariah Courts to do anything more than give the confirmation of dissolution of marriage. Power to make ancillary orders must be looked for in paragraph (b) of s 46(2) of the Administration Act or elsewhere in the Family Law Act, but the power under that paragraph is only in relation to Muslim marriages and the husband has not shown any other provision of the Family Law Act that enables the Syariah Court to make ancillary orders in cases under s 46(2) of that Act.

CONCLUSIONS AND ANSWERS ON JURISDICTION

[147] The wife therefore succeeds on the question of jurisdiction. The dissolution of the marriage in this case, which is a non-Muslim marriage, and matters consequential or ancillary thereto, including maintenance, custody of children and other ancillary reliefs, are not matters within the jurisdiction of the Syariah Courts. Therefore cl (1A) of art 121 does not apply to deprive the High Court of its jurisdiction under s 51 of the Law Reform Act. The High Court has the exclusive jurisdiction. The answer to Question 2.1 is therefore in the affirmative. So is the answer to Question 2.2, which is as follows:

2.2 Further to question 2.1:

2.2.1 are provisions such as s 46(2)(b)(i) of the Administration of Islamic Law (Federal Territories) Act 1993 ('the 1993 Act') intended only to address marriages solemnized under the relevant State Islamic legislation ('Islamic marriages');

2.2.2 as such, is the jurisdiction and/or power vested by such provisions in the Syariah Courts limited to the granting of decrees of divorce and orders consequential to such decrees pertaining to inter alia maintenance, custody and child support in respect of Islamic marriages?

[148] Question 2.3 is as follows:

> In the event, the answers to question 2.2.1 and 2.2.2 are in the affirmative, is it an abuse of process for the converted spouse to file custody proceedings in the Syariah Courts in respect of the children of the Law Reform Marriage?

The answer is in the affirmative. It is an abuse of process, primarily because the Syariah Courts have no jurisdiction in the matter of the custody of children of a non-Muslim marriage.

[149] The husband has not advanced any reason why the injunction as to commencing or continuing with proceedings in the Syariah Courts ought not to be granted even if the wife should succeed on the question of jurisdiction. It may be safely assumed therefore that the wife's substantive appeal has been conducted on both sides on the basis that that is the only question on which the grant of the injunction would depend. I would therefore grant the injunction against proceedings, but with this exception, that it does not extend to the husband's application to the Syariah Subordinate Court under s 46(2) of the Family Law Act. The wife has argued her appeal on the basis that the section is a valid provision. Given that it is a valid provision, this court ought not to prevent the husband from seeking the confirmation that the Syariah Court is empowered to give, although I can see a real difficulty in the way of a proper and just implementation of the section. The difficulty is in the constitutional bar to the Syariah Courts' jurisdiction over a non-Muslim. It could be difficult to overcome the objection that to make the non-Muslim spouse a party to an application under the section would breach the constitutional bar. To avoid that difficulty, an application under the section will have to be treated as an ex parte application by the Muslim spouse. But I would refrain from ruling that an application under the section has to be an ex parte application because there may be instances where the other spouse will want to argue against confirmation. In this particular case, however, perhaps dealing with the application as an ex parte application would not be unjust to the wife because she herself wants the marriage to be dissolved on account of the husband's conversion. I think that the real concern of the wife in this case is the ancillary reliefs, particularly the custody of the children, but those would be taken care of by the injunction.

[150] There are three questions relating to the power of the High Court to grant interim injunctions. They are as follows:

2.5.1 Is the High Court empowered to grant interlocutory relief aimed at preserving status quo in the course of disposing a petition under section 51 of the Law Reform (Marriage and Divorce) Act 1976?

2.5.2 If so, can the High Court grant interim injunctions to prevent abuses of process having the effect of undermining the petition filed under section 51 of the Law Reform (Marriage and Divorce) Act 1976?

2.6 Does Article 121(1A) of the Federal Constitution prevent the High Court from granting such interim injunctions where the abuse of process is effected through the jurisdictionally incompetent and deficient

2.6.1 filing of proceedings in the Syariah Courts and/or

2.6.2 unilateral conversion of a minor child of the Law Reform Marriage by the converted spouse?

As Question 2.6.2 concerns the injunction against conversion, and also to judge by the wording of the rest, the rest must relate to the injunction against proceedings. I will revert to Question 2.6.2 when I come to deal with the question of conversion. As for the rest, the husband's counsel said that Questions 2.5.1 and 2.5.2 arise from s 54(b) of the Specific Relief Act 1950. Question 2.6.1 basically addresses the problem of jurisdiction. The questions of s 54(b) and of jurisdiction have already been considered and decided in favour of the wife. I will not answer those three questions directly in the affirmative because they carry in them suppositions that may not be correct. For example, as regards Question 2.5.2 I am reluctant to go along with the supposition that the husband's applications to the Syariah Courts will have 'the effect of undermining' the wife's petition. I will answer the questions by simply saying that the High Court could grant and should have granted, and that I would grant, the injunction against proceedings, with the exception of the application for confirmation under s 46(2) of the Family Law Act.

THE HUSBAND'S FOURTH HEAD OF SUBMISSION

[151] I can now deal with the husband's fourth head of submission which is one that relies on the fact that Islam is the religion of the Federation by virtue of art 3(1) of the Constitution for giving victory to the Syariah Court side in a conflict of jurisdiction between the Syariah Courts and the secular courts. Of the four heads of submission, this occupies the most number of pages. The thinking behind this argument is akin to one that inclines towards making Islamic law, by virtue of Islam being the religion of the Federation, something like the supreme or prevailing law of this country. That kind of thinking was rejected by the Supreme Court in *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55, where Salleh Abas LP, who spoke for the court, in considering the word 'Islam' in art 3(1), spoke of the religion in this way at p 56C–D (left):

> There can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial. This way of ordering the life with all the precepts and moral standards is based on divine guidance through his prophets and the last of such guidance is the Quran and the last messenger is Mohammad saw whose conduct and utterances are revered.

He then asked the question whether that was the meaning of 'Islam' intended by the framers of the Constitution in art 3(1) and answered to the effect that it was not. The husband submits that the case is no longer good law because the Supreme Court made two grave errors. I disagree about the two errors, but I will not labour to explain why or to say more about this head of submission because the husband's counsel explained orally that this head would be relevant only if this court should find that both the Syariah High Court and the secular High Court have jurisdiction in this case and, as has been said, I find that only the secular High Court has jurisdiction.

[152] The art 3(1) argument is also used to contend that Parliament had no power to enact s 51 of the Law Reform Act because it compels the application by the civil courts to a Muslim of the civil law in matrimonial cases. I am unable to see how the fact that Islam is the religion of the Federation prohibits Parliament from passing a law to ensure that where a spouse in a non-Muslim marriage converts to Islam and the marriage is consequently dissolved, he or she remains bound to the obligations under the legal regime governing a non-Muslim marriage, that he or she undertook to the other spouse, as regards himself or herself and the children of the marriage, when he or she entered into the non-Muslim marriage. I am unable to see how the fact that Islam is the religion of the Federation can operate to prevent a measure to ensure that the non-converting spouse is not frustrated in his or her expectations flowing from those obligations.

THE INJUNCTION AGAINST CONVERSION

[153] I turn now to the question of the wife's application for an injunction against the conversion of Sharvind. Before this court, the wife's submission on the conversion question has been confined solely to the assertion that the conversion of a minor child requires the consent of both parents, so that, since the wife does not consent to the conversion of Sharvind, the husband should be restrained from converting him. The husband also has confined his submission to the question of parental consent, contending that the consent of the husband only is sufficient for the conversion of the children. The husband has not, for example, submitted that there is no question of

Sharvind being converted by the husband's participation because Sharvind is in the wife's actual custody and he is not interested in having Sharvind converted.

[154] Both s 95 of the Administration Act and s 117 of the Selangor Enactment provide that a non-Muslim child who has not attained the age of eighteen years may convert to Islam if '… his parent or guardian consents to his conversion'.

[155] Clauses (3) and (4) of art 12 of the Constitution provide as follows:

> (3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.
>
> (4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

[156] In *Teoh Eng Huat v Kadhi, Pasir Mas* [1990] 2 MLJ 300, the High Court had ruled that a Buddhist girl who had, apparently of her own free will, converted to Islam had the constitutional right to decide her own religion and that cl (4) of art 12 applies only for the purposes of cl (3), in cases where there is some form of coercive element. The Supreme Court, however, decided otherwise as follows, at p 302B–D (right):

> It is our considered view that the law applicable to her immediately prior to her conversion is the civil law. We do not agree with the learned judge's decision that the subject although below 18 had capacity to choose her own religion. As the law applicable to the infant at the time of conversion is the civil law, the right of religious practice of the infant shall therefore be exercised by the guardian on her behalf until she becomes major. In short, we hold that a person under 18 does not have the right and in the case of non-Muslim, the parent or guardian normally has the choice of the minor's religion.

It was, however, not expressly stated that that opinion was an interpretation of cl (4) of art 12. Be that as it may, it is to be observed that in that passage the word 'parent' is used in the singular, just as it is used in the said cl (4) and in s 95 of the Administration Act and s 117 of the Selangor Enactment.

[157] Construing *Teoh Eng Huat* to mean that by virtue of the said cl (4) the conversion of a non-Muslim person under eighteen requires the consent of his 'parent or guardian', the wife argues that, by virtue of the rule of construction that the singular includes the plural, 'parent' in cl (4) must be read in the plural to mean both parents. In my opinion, in the case of the word 'parent' in cl (4) and in the said ss 95 and 117, it is improper to begin construing it by applying the said rule of construction and thereby reading it

as 'parents'. One has to begin by construing what is the meaning of 'parent'. The ordinary meaning is 'a father or mother'. See, for example, the *Concise Oxford Dictionary*. So is the legal meaning. *Black's Law Dictionary*, (7th Ed), gives the meaning as 'the lawful father or mother of someone'. The relevant phrase in cl (4) has, therefore, to be read as 'by his father or mother or guardian'. The same applies to the two sections. The relevant words have to be read as 'if … his father or mother or guardian consents'. Either the father or mother will do, not both. With that, the question of applying the rule about the singular including the plural no longer arises because 'mothers or fathers' would be out of the question. The Bahasa Malaysia text of the Administration Act, which is the authoritative text, in fact says in s 117 'jika … ibu atau bapa atau penjaganya mengizinkan'.

[158] In the Selangor Enactment, however, although, as I said, the word 'parent' in the English text should read 'father or mother', the Bahasa Malaysia text, which is the authoritative text, has in s 117 'jika … ibu dan bapa atau penjaganya mengizinkan', so that in the State of Selangor a non-Muslim under eighteen has to have the consent of both parents to convert to Islam. In the Federal Territory of Kuala Lumpur, however, only the consent of one parent is required, and that is not at variance with cl (4) of art 12 of the Constitution.

[159] But the question of parental decision or consent in those provisions is a question that goes only to the legality or validity of the act in question. Take cll (3) and (4) of art 12. Reading Clause (4) literally and strictly, the decision by a parent that it requires as to the religion of his or her infant child is only for the purposes of cl (3). Clause (3) is a provision that guarantees that a person will not be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own. There comes to mind, as a theoretical example, the question of teaching the subject of religious studies in a particular religion in schools. A child who does not belong to that religion cannot, because of cl (3), be required to attend the classes for that subject. The learning of the subject cannot be made compulsory for him. But when the school or education authorities are not sure what the religion of a child is, and either the mother or father decides that the child's religion is the religion of the subject to be taught, then he can be required to learn the subject, and in doing so the authorities will be acting, and will be protected, legally and constitutionally. As for conversion to Islam, the consent of either parent will render the conversion valid in law.

[160] But that does not mean that the other parent has no right to object or to prevent his child from being taught that religion or being converted to Islam. The wife has referred to ss 5 and 11 of the Guardianship of Infant's Act 1961 (Act 351), which provide as follows:

5(1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.

(2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.

11. The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

[161] Generally speaking, what those sections, especially s 5, do is to give both parents an equal say in the affairs and destinies of their children. The fact that each has an equal say must necessarily result sometimes in opposing wishes. If both agree over something concerning their child no problem arises and the right of equal say is not of operative importance. If they are opposed, a decision has to be reached as to whose wishes are best for the child, otherwise the child might suffer a disadvantage. The right of equal say entitles one spouse to come to court to prevent the other from doing what he or she intends to do about their child. The court will then decide for the wife or the husband, unless they can agree. Otherwise it ends with the thing being done according to the wishes of one parent only. So in the case of receiving instruction in a religion, the school authorities will act according to the decision of the winning parent only, and if he or she is the parent who decided that the religion of the child is the religion of the subject to be taught, they may proceed to teach the child the subject. And in the case of conversion to Islam, if the spouse that wants to consent to conversion is the winning spouse, he may go ahead and consent. In either case, the fate of the child in the matter of religion will be determined according to the decision or consent of one parent only, and the compulsory instruction will be legal and constitutional and the conversion will be valid in law.

[162] The husband is therefore right in contending that the conversion of Sharvind requires his consent only, at least in Kuala Lumpur, but that is only to make it valid. He is, however, not right in arguing that for that reason the wife is not entitled to prevent the conversion and therefore not entitled to the injunction. The wife has an equal right not to want Sharvind to be converted. She is claiming custody of the two children, hoping probably that, having legal custody of the children, she will be in a good position in law to obtain

A the permanent injunction against conversion in the petition. In the meantime she seeks the interim injunction against conversion as regards Sharvind in order to preserve the status quo so that there will be no risk of Sharvind being converted before her petition is finally determined.

B **[163]** There are two leave questions about conversion. One is Question 2.6.2 that has been mentioned, which is made to hang on cl (1A) of art 121. Actually the question of cl (1A), which concerns the jurisdiction of courts, has no bearing at all on conversion because conversion in the Federal Territory of Kuala Lumpur and in the State of Selangor does not involve
C courts. It has only an indirect bearing in that if, in this case, the jurisdiction question were decided against the wife, the petition will fall, including, arguably, the prayer for the permanent injunction against conversion, and with it the application for the interim injunction against conversion which depends on the petition. Question 2.6.2 also presupposes 'abuse of process'
D by unilateral conversion. I would hesitate to apply the concept of abuse of process to a matter that does not concern the courts. The other question also mentions 'abuse of process' and is as follows:

E 2.4 Is it an abuse of process for a spouse of a Law Reform Marriage to unilaterally convert the religion of a minor child of the Law Reform Marriage without the consent of the other parent?

F **[164]** The answer to Question 2.4 has already been given. Simply put, while the conversion of a child is valid, at least in Kuala Lumpur, with the consent of one parent, the other parent has the right to object to the conversion and to seek an interim injunction to prevent the conversion until his or her objection is adjudicated upon. An interim injunction against
G conversion ought to be granted in this case and I would grant it and I think that ought to be sufficient as an answer to Question 2.6.2.

CONCLUSION ON THE SUBSTANTIVE APPEAL

H **[165]** To conclude, I would allow with costs here and in the Court of Appeal and the High Court the wife's appeal No 19 and grant the interim injunctions sought, that is, the injunction against the conversion of Sharvind and the injunction against commencing and continuing proceedings, except that the latter injunction is not to apply to the husband's application for
I confirmation under s 46(2) of the Family Law Act. The injunction will apply to prevent the husband from seeking ancillary reliefs on that application.

The deposit must be refunded. A

THE ERINFORD APPEALS

[166] In respect of the wife's Erinford appeal, appeal No 21, and the husband's Erinford appeal, appeal No 20, leave to appeal was granted on the following two questions: B

Q1 Where a Court disallows an application for an interim injunction on the basis of a want of jurisdiction and the said decision is appealed, is the Court disentitled from granting an Erinford type injunction? C

Q2 Does the Federal Court have exclusive jurisdiction to grant an Erinford type injunction pending the hearing and disposal of an application for leave to appeal to the Federal Court or is it a concurrent jurisdiction exercisable by the Court of Appeal in the first instance? D

[167] The first question seems to be a general question about the granting of Erinford-type injunctions by 'a court'. It is not clear whether the factor of 'want of jurisdiction' is meant to have any significance to the question, but apart from that the answer to the question has clearly to be in the negative. A court is not disentitled from granting an Erinford-type injunction in the circumstances in the question, because it is in those circumstances that the need for an Erinford injunction arises. E F

[168] The first question relates to the wife's Erinford appeal, which is an appeal arising from the husband's success in the Court of Appeal in his appeal against the Erinford injunction granted by the High Court in favour of the wife pending her appeal to the Court of Appeal. The majority of the Court of Appeal apparently allowed the husband's Erinford appeal as the inevitable consequence of the dismissal of the wife's appeal. It has not been argued in this court that Aziah Ali JC exercised her discretion wrongly in granting the Erinford injunction. My decision on the wife's substantive appeal has vindicated the granting of the Erinford injunction. I would therefore allow the wife's Erinford appeal with costs here and in the Court of Appeal and reverse the decision of the Court of Appeal. The deposit must be refunded. G H

[169] The second question relates to the husband's Erinford appeal, appeal No 20, which had arisen because after dismissing the wife's substantive appeal and the wife's Erinford appeal on 13 March 2007, the Court of Appeal, on 30 March 2007, granted the wife, on her notice of motion, an interim injunction on the same terms as granted by the High Court, pending the wife's application for leave to appeal to this court. I

[170] It is the husband's contention that the Court of Appeal had no jurisdiction, after dismissing the wife's appeal, to act under s 44 of the Courts of Judicature Act 1964 and grant the Erinford injunction. Subsection (1) of s 44 provides as follows:

> (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.

It is clear from the subsection that directions and orders can only be made under it 'In any proceedings pending before the Court of Appeal' and, further, that an interim order to prevent prejudice to the claims of the parties can only be made to prevent prejudice 'pending the hearing of the proceedings', which is the proceeding that is pending before the Court of Appeal. The husband therefore argues in this court, as he did in the Court of Appeal, that after dismissing the wife's appeal to it, the Court of Appeal had no jurisdiction under s 44 to grant the wife an interim injunction pending her application to this court for leave to appeal to this court. The husband says that the wife ought to have applied for the interim injunction to this court under s 80 of the Courts of Judicature Act 1964, which applies to this court but otherwise is in pare materia with s 44.

[171] Against that argument, the majority of the Court of Appeal resorted solely to the judgment of Abu Mansor JCA in *Chong Mooi Leong & Ors v Lebbey Sdn Bhd (No 2)* [1998] 2 MLJ 661. So does the wife in this appeal. She also relies on *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd* [2002] 4 MLJ 113 and *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize* [2003] 1 WLR 2839, but clearly these two latter cases are of no assistance for the question in hand.

[172] As for *Chong Mooi Leong*, it was about an application for stay of execution of the judgment of the Court of Appeal giving vacant possession of premises, which Abu Mansor JCA treated as an application for the preservation of the property, pending an application for leave to appeal to this court. The question was whether the Court of Appeal had jurisdiction to order a stay of execution. The majority held that it had, but not in reliance on s 44 of the Courts of Judicature Act 1964. Abu Mansor JCA relied on other provisions referred to by the appellants' counsel, including rule 76 of the Rules of the Court of Appeal 1994. This was what the learned Judge said at p 671 G-H:

> … the provisions referred to by the appellants' counsel clearly empower this court to grant the appellants' application and s 79 of the Courts of Judicature Act 1964 reads:
>
> Applications.
>
> Whenever application may be made either to the Court of Appeal or to the Federal Court, it shall be made in the first instance to the Court of Appeal.
>
> The appellants have therefore correctly made this application before this court. This application, in our view, is also proper and reasonable because it is trite law that a court who has given judgment certainly has the power to order stay …

[173] The majority of the Court of Appeal in this case regarded the words 'it is trite law that a court who has given judgment certainly has the power to order stay' in that passage as having conclusively determined the issue against the husband. But those words concern stay of execution and it is probable that Abu Mansor JCA considered what he said to be trite law because s 102 of the 1964 Act provides that 'An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Federal Court so orders'. So there is express provision empowering the Court of Appeal or the Federal Court to stay execution of the Court of Appeal's decision pending appeal and s 79 cited by Abu Mansor JCA requires the application for a stay to be made in the first instance to the Court of Appeal.

[174] The wife's Erinford application to the Court of Appeal does not state that it was made under sub-s (1) of s 44 of the 1964 Act. By relying on Chong Mooi Leong, which was about stay of execution, the majority of the Court of Appeal and the wife may be understood to be regarding the injunction as, or to be likening it to, a stay of execution.

[175] The authority for the granting of an Erinford or an Erinford-type injunction is *Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448, where Megarry J, after refusing an interlocutory injunction, granted an injunction in the same terms pending appeal. He did so on the principle that when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not nugatory' (p 454f). And at g–j, he said:

> I accept, of course, that convenience is not everything, but I think that considerable weight should be given to the consideration that any application for a stay of execution must be made initially to the trial judge. He, of course, knows all about the case and can deal promptly with the application. The Court of Appeal will not be troubled with it unless one of the parties is dissatisfied with the decision of the judge, in which case the Court of Appeal will at least have whatever

> assistance is provided by knowing how the judge dealt with the application. Although the type of injunction that I have granted is not a stay of execution, it achieves for the application or action which fails the same sort of result as a stay of execution achieves for the application or action which succeeds. In each case the successful party is prevented from reaping the fruits of his success until the Court of Appeal has been able to decide the appeal. Except where there is good reason to the contrary (and I can see none in this case), I would apply the convenience of the procedure for the one to the other …

Megarry J, in justifying his action of granting the injunction, clearly was influenced by considerations about stay of execution. He was making the justification in face of an objection that he had no jurisdiction to grant the injunction and only the Court of Appeal could do so.

[176] I would treat the granting of an Erinford injunction as analogous or akin to the grant of stay of execution and hold that it was proper for the wife to apply for the Erinford injunction to the Court of Appeal in the first instance. My answer to the second question would therefore be that the jurisdiction to grant an Erinford-type injunction pending the hearing and disposal of an application for leave to appeal to the Federal Court is a concurrent jurisdiction exercisable by the Court of Appeal in the first instance.

[177] Apart from jurisdiction, the husband has only another ground for his appeal, which was his third ground for objecting in the Court of Appeal to the wife's application for the Erinford injunction. That ground and the way the majority of the Court of Appeal dealt with it may be seen from the following passage in the judgment of Gopal Sri Ram JCA:

> 7. The husband's third ground of objection is this. There has been no change in circumstances since the holding over injunction was dissolved by this Court on the husband's appeal. As such a grant of an order in terms of that sought by the wife will amount to a review by this Court of its own decision. This is an argument that is devoid of any merit. The injunction that was dissolved by my learned brothers in their judgments was one that held the parties to the status quo pending an appeal to this Court. The order now being sought is one that seeks to preserve what Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130 termed as 'the dynamic status quo' pending the wife's application for leave to the Federal Court. The issue before this Court in the husband's appeal was whether, having regard to the interpretation given to the several pertinent statutory provisions already discussed in the earlier judgments, the holding over injunction ought to remain. That question was naturally answered in the negative by the majority judgments because the wife's appeal failed. But the

> question before us on the present motion is quite different. It is whether the status quo presently prevailing should remain undisturbed until the correctness of this Court's decision has been tested at the next level. So it is quite wrong to treat — as counsel for the husband has done — the motion for the present interim preservation orders as an application to review our earlier ruling. It is not …

[178] I am unable to disagree with what is said in the passage. I would therefore dismiss the husband's appeal with costs and uphold the majority decision of the Court of Appeal. The deposit must be paid to the wife to account of taxed costs.

Azmel FCJ:

[179] I have the benefit of reading the judgments in draft of my learned brothers Nik Hashim FCJ and Abdul Aziz Mohamed FCJ. After having considered those judgments I would agree with the views expressed and the decision arrived by my learned brother Nik Hashim FCJ.

Wife's inter partes injunction dismissed and appeal allowed. Husband's appeal dismissed.

Reported by Sally Kee